

ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT

HEARING BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

TO CONDUCT OVERSIGHT OF THE IMPLEMENTATION OF THE ENERGY
EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM

NOVEMBER 21, 2003



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ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT

FRIDAY, NOVEMBER 21, 2003

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m. in room SD-366, Dirksen Senate Office Building, Hon. Jim Bunning presiding.

OPENING STATEMENT OF HON. JIM BUNNING, U.S. SENATOR FROM KENTUCKY

Senator BUNNING. The committee will come to order. We are temporarily detained because Senator Grassley is making some phone calls on the energy bill. I am going to make my opening statement and then hopefully Senator Grassley will be here for his testimony.

Today's hearing focuses on the Department of Energy's role in the Energy Employees Occupational Illness Compensation Program. We are having this hearing because of the findings from an ongoing GAO investigation that I requested because of concerns that the Department of Energy workers at the Paducah Gaseous Diffusion Plant in Paducah, Kentucky, and the DOE workers at other sites have expressed to me about subtitle D of the program.

This program was created in 2000 to compensate employees of the Department of Energy or its contractors who developed illnesses due to their work for the Nation's nuclear weapons program. There are two major parts of the program that are administered by two agencies, the Department of Labor and the Department of Energy. The Department of Labor under subtitle B of the act has made a final decision on about 53 percent of all filed cases and has paid more than \$700 million in claims. In contrast, the Department of Energy under subtitle D of the act has made a decision on only 6 percent of all filed cases and none—I repeat, none—have received workers compensation. The DOE's current track record for processing claims disturbs me and causes me serious concern about whether the Department has the capability to handle the compensation program.

As most of my colleagues on the committee know, we have been dealing with contamination at the Paducah plant for some time now. During the 106th Congress I sat on the Energy Committee and we conducted field hearings in Paducah that brought to light the actual extent of the contamination in the workplace and the problems at that plant.

We discovered that workers at the plant were exposed to radioactive materials for over 50 years at the Department of Energy site across this country. Many workers sacrificed their health and safety and were placed unknowingly in harm's way to make nuclear weapons for our country.

Many of the workers at the Paducah plant have received compensation for the illnesses due to radiation and beryllium under subtitle B. However, over 2,400 former Paducah workers exposed to toxic substances still are waiting to have their cases heard to receive compensation for their illnesses. I hope that this hearing and the GAO's final report on this issue will bring to light a way for us to end the backlog of those thousands of cases that have not received any compensation.

We begin today with Senator Charles Grassley in the first panel. On the second panel, the Department of Energy Under Secretary Robert Card will be the person testifying. On the third panel we have six witnesses: Mr. Robert Robertson, Director of Education, Workforce, and Income Security Issues with the U.S. General Accounting Office; Dr. John Burton, a professor at Rutgers University who was appointed by President Nixon to and served as Chairman of the National Commission of State Workman's Compensation Laws; Mr. Leo Owens, president of the Paducah, Kentucky, chapter of the PACE union—I am honored that Leon has taken the time to come to testify before this committee today—Dr. David Michaels, now a professor at George Washington University and formerly the Assistant Secretary of Energy for Environment, Safety, and Health; Mr. Richard Miller, a Senior Policy Analyst with the Government Accountability Project; and last but not least, Mr. Donald Elisburg, an attorney with the AFL-CIO in the Building Construction Trades Department.

I will get to your opening statements in a minute. Let us let Senator Grassley go ahead and do his testimony. I know how busy he is. Senator Grassley, go ahead.

[The prepared statements of Senators Bingaman, Domenici, Harkin, Kennedy, Schumer, and Voinovich follow:]

PREPARED STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR
FROM NEW MEXICO

Let me first thank all the witnesses from coming here today.

Several years ago, I held with Representative Tom Udall, a public meeting in Espanola, New Mexico to discuss the compensation of workers at Los Alamos. The gathering was attended by over 300 present and former nuclear weapons workers. There is one particular story about one New Mexican being exposed to mercury.

Mr. Alex Smith of Espanola, operated a mercury still at the Los Alamos National Laboratory. Mr. Smith displayed all the signs of both acute and chronic mercury poisoning. He approached LANL's physician seeking treatment and protection only to be told he was not suffering from mercury illness. Later, discovery by investigators revealed a different story. In fact, the physician did suspect Mr. Smith was suffered from mercury toxicity but for reasons we can only speculate on now failed to act.

As a result of this and other stories about sick DOE workers, I, while a member of the Senate Armed Services Committee, along with Senators Bunning, Domenici, McConnell, Voinovich, Thompson, and other colleagues in the Senate, worked hard to add the Energy Employee's Occupational Illness Act into the National Defense Authorization Act for fiscal year 2000. The provision was so controversial that it almost brought the conference to a halt but we succeeded.

Three years later, we are now examining how this program is being implemented at the Department of Energy.

I have a few concerns on the overall program and its progress.

The enabling legislation asked for a legislative proposal on how to implement and improve this program no later than March 1, 2001. To my knowledge I have not seen these recommendations.

I am concerned about the issue of whether the Department of Labor is not the best place to carry out the compensation program in subtitle D, which is currently carried out at the DOE. The Department of Labor has a long history, infrastructure, and culture of carrying worker compensation programs. The slow progress the DOE has shown to date with a relatively inexperienced contractor, and increasing appropriations requests, three years after the program started, indicates to me that the DOE is slowly building up an infrastructure and expertise that may already exist at the Department of Labor.

Finally, from a policy sense, I am concerned about whether part D can work even if the DOE successfully implements the program. Part D has the federal government entering into a state compensation system, which is inherently an adversarial one. Under the Atomic Energy Act, the private contractors who run the nuclear weapons facilities perform an inherently governmental function.

Perhaps it is better to replace part D with a program similar to the Federal Employee's Compensation Act, or FECA, to be run out of the Department of Labor. Similar to FECA the atomic worker's claims are paid for directly by the Federal Government, through the appropriations process. I am sure an FECA-like program would eliminate the adversarial nature that part D inherently encounters in accomplishing its mission.

So, let me again thank the witnesses for coming today and I look forward to this hearing, and the insight the witnesses have to offer here today on this important program.

PREPARED STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR
FROM NEW MEXICO

Today's hearing is devoted to discussion of the DOE role in the Energy Employees Occupational Illness Compensation Program.

This complex program was created in 2000, with the goal of compensating employees of the DOE or its contractors who developed illnesses due to their support of the nation's nuclear weapons programs.

The two major parts of the program are administered by two agencies, the Departments of Labor and Energy. The part administered by Labor is far simpler, and it is progressing at a more rapid rate than the part with Energy.

Some will argue that a "solution" is to shift all the administration to Labor, and in the course of today's hearing that position can be examined.

From my initial study of the issues in this program, I'm not convinced that a simple shift to Labor will solve all the issues. There may be fundamental flaws in the legislation which created this program, and this hearing should help us understand the range of possible remedies that Congress may wish to consider.

We begin today with Senator Charles Grassley in the first Panel.

Department of Energy Under Secretary Robert Card will be in the second panel. In the third panel, we have six witnesses:

- Mr. Robert E. Robertson, Director for Education, Workforce, and Income Security Issues with the U.S. General Accounting Office;
- Dr. John Burton, a Professor at Rutgers University, who was appointed by President Nixon to, and served as Chairman of, the National Commission on state Workmen's Compensation Laws;
- Mr. Leon Owens, President of the Paducah Kentucky Chapter of the PACE union;
- Dr. David Michaels, now a Professor at George Washington University and formerly the Assistant Secretary of Energy for Environment, Safety and Health;
- Mr. Richard Miller, a Senior Policy Analyst with the Government Accountability Project; and
- Mr. Donald Elisburg, an attorney with the AFL-CIO and the Building and Construction Trades Department.

Statements have also been introduced for the record from Senators Voinovich and Kennedy.

PREPARED STATEMENT OF HON. TOM HARKIN, U.S. SENATOR FROM IOWA

Mr. Chairman, I received a letter in December 1997, from Bob Anderson, a constituent in Burlington, Iowa. He said that he had been diagnosed with non-Hodgkins lymphoma, as were some of the other people he had worked with at the Burlington Atomic Energy Commission Plant in nearby Middletown, Iowa. At that time, I had no idea the federal government had manufactured nuclear weapons in Iowa. Neither did the Department of Energy.

We've been on a long, bumpy road to justice for these workers since I got that letter almost six years ago. As it turns out, the Iowa Army Ammunition Plant (IAAP) included a nuclear weapons assembly plant from 1947 to 1975. In 1999, I worked with DOE to include the plant in its programs for the nuclear weapons complex and to find, declassify, and release thousands of documents about the plant. I brought Secretary Richardson to Burlington to listen to the former workers at IAAP and to assure them they could talk about problems at the plant. And I have worked to change the Pentagon policy that prevents them from even admitting that nuclear weapons work went on at the site.

I've obtained funding for and supported a health study of the former nuclear weapons workers conducted by the University of Iowa, which is doing an outstanding job of carefully considering this issue, and shows tremendous concern and compassion for sick workers.

I cosponsored the bill to provide compensation of \$150,000 and health care for workers who were harmed by exposure to radiation at IAAP and other nuclear weapons plants, and I continue to press to make the program work for Iowa's workers.

I have been working to speed the cleanup of the IAAP site, and worked to get limited sampling that discovered chunks of depleted uranium on the ground and a burial site for barium. I persuaded the Army to accommodate neighbors, who were worried about the safety of their well water, by connecting their houses to the public water system.

Mr. Chairman, I mention all of these things because it's very important to look at this matter from a worker's perspective. If I were sick with cancer from my job, the role of the Department of Energy in the administration of subtitle D of the Energy Employees Occupational Illness Compensation Program Act is just another complicated obstacle that I don't have the strength to deal with. If I'm sick with cancer, I just want my claim processed expeditiously. And I want the area clean and safe for my children and grandchildren.

However, today, the processing of claims under the EEOICPA is the topic at hand. There are two main problems with the way that this program is affecting the Iowa workers. First, we have a serious problem with finding a responsible party to pay claims. It's as though IAAP is a "forgotten site." There is no longer a DOE contractor on site. Iowa workers compensation (as in most states) has a statute of limitations. The only way around this dilemma is to have a "willing payor," which normally would be a current DOE contractor that can charge the expense to DOE. But there is no such contractor at IAAP.

DOE has said in the recent past that they are working to find creative ways to find payors. However, I have yet to see any proposed solutions for Iowa.

The other major problem—which has also been of great interest to my colleague from Iowa, Senator Grassley—is the excessively long time DOE is taking to process employee compensation claims. While 90 percent of the claims that fall under DOL have been processed (except those awaiting action from another agency), a very small percentage of DOE claims have been processed. I have worked hard to increase funding, but the GAO has clearly stated that more money is not the answer. Fundamental changes must take place. Whether that means moving the processing to DOL or some other kind of fundamental structural change, I do not know. But I would like to see major changes taking place that will address this very serious concern.

Obviously, DOE could be processing all the claims expeditiously. But without a two-tiered approach that also solves the "willing payor" problem, Iowans are still in the same predicament, with no way to receive compensation for their illnesses. Late in the last Congress, I was pleased to work with Senators Bingaman, Bunning, Allard, Clinton, and Reid to introduce a bill that would have designated the Department of Labor as the willing payor. I look forward to revisiting this with my colleagues in the near future.

So, Mr. Chairman, I very much look forward to hearing the Department's ideas about how it plans, at long last, to process and pay these long-delayed claims. I believe that the way these forgotten nuclear workers have been treated by our government is truly one of the gravest injustices I've seen in my state. People whose only

reward for years of hard work is illness and premature death cannot and should not be disregarded and forgotten by their government.

PREPARED STATEMENT OF HON. EDWARD M. KENNEDY, U.S. SENATOR
FROM MASSACHUSETTS

Today, thousands of brave men and women in uniform are serving our country with great courage and dedication in Iraq and many other nations, and here at home as well. Our military strength and national security depend heavily on them, and also on the efforts of countless Americans who help to build our defenses here at home.

But we have not always given them the support they deserve. For decades during the Cold War, hundreds of thousands of workers served the United States well in the production of nuclear weapons. But in doing so, they were often exposed to radioactive materials and other toxic substances whose long-term health affects were poorly understood, and many of them contracted disabling and even fatal cancers and other serious illnesses.

In 2000, to respond to this plight, Congress passed the bi-partisan Energy Employees' Occupational Illness Program Act to provide fair compensation to employees of the Department of Energy or its contractors who had suffered because of this exposure.

Parts of the Act have been a great success. Tens of thousands of workers have received needed health care and compensation for their illnesses. The Department of Labor has processed over 30,000 claims within its area of responsibility, and \$710 million in benefits have been paid to employees or their survivors.

The Department of Energy, however, has been far less responsive. By earlier this month, it had not even begun processing 14,000 claims—three-quarters of the total it has received. According to the General Accounting Office, it will take the Department seven years to process the current backlog. The Department has not identified a willing payor for valid claims in many states. As a result, large numbers of workers and their families in these states are waiting for the compensation they deserve.

These delays are unacceptable, and I strongly support the legislation proposed by Senator Grassley and Senator Murkowski to use the expertise and capacity of the Department of Labor to expedite these claims. Shifting this responsibility to the Labor Department will not resolve all of the problems under the current law but will be a major improvement over the current flawed system that is so unfair to these dedicated men and women who sacrificed their health and even their lives in service to our country. I want the country to do all it can to see that they receive as soon as possible the care and compensation the nation owes them.

PREPARED STATEMENT OF HON. CHARLES E. SCHUMER, U.S. SENATOR
FROM NEW YORK

I have come here today to address the issues surrounding the Department of Energy's implementation of the Energy Employees Occupational Illness Compensation Program (EEOICP), first enacted three years ago to provide compensation to employees of the Department of Energy and its contractors who developed illnesses from exposure to radiation and other toxic substances.

The EEOICP was created for the purpose of providing necessary compensation to sick workers in a fair and timely manner. However, thousands of affected workers in my home state of New York and across the country have gone uncompensated, despite filing claims with the government under this program.

Most of these people are suffering from serious illnesses and simply do not have the time to sit around waiting for their claims to be processed through a system that is clearly broken. These workers have been severely harmed by the poor administration of the Energy Employees Occupational Illness Compensation Program and it is imperative that we make the necessary changes to help these brave people.

Since this program's conception three years ago, the Department of Energy-administered portion of this program has processed only 109 out of nearly 21,000 applications nationwide. That is a mere 0.5%. To the best of my knowledge, none of claims approved by the Physician Panels have been paid. DOE has not even begun processing 75% of its claims.

Currently, the vast majority of New York cases are awaiting development despite being filed over two years ago with DOE. In New York State, the Physician Panels have not reviewed a single case because DOE has deemed all of them ineligible, thus blocking any of them from coming before medical doctors for review. I want

to know why every single claim processed by DOE has been denied a review by a physician's panel in 3 years.

Furthermore, why have no claims been paid to sick New York workers in 3 years? A target date from DOE to complete claims for EEOICPA Part D needs to be set.

We need to enact reform that results in greater accountability and efficiency. New York is home to 36 sites covered under the Energy Employees Occupational Illness Compensation Program. All are either atomic weapons employer facilities, DOE facilities or Beryllium vendors. Thousands of workers have labored in these plants over the decades, yet none have received assistance under DOE's program in New York.

Nationwide, DOE has set up only 10 resource centers to help their former employees who have acquired work-related illnesses. However, none of these facilities are in New York State. That may be one reason why there has been a disproportionately low amount of applications filed over the last 3 years from my home state.

It begs the question, why does New York State have no resource centers used for outreach to former employees of DOE when we have the most combined DOE and contractor facilities in the country? The closest resource center is in Ohio. This is unacceptable.

New York was at the epicenter of the effort to develop the country's nuclear weapons program and provide the deterrent that was needed to keep the Soviets at bay during the Cold War. Workers across my state, from Niagara and Buffalo to West Valley and Brookhaven, were asked to devote themselves to this cause, with no regard to their health or safety. Scores of people were exposed to toxic levels of radiation and now have cancer.

To recognize their sacrifice, Congress passed a law to help these people cover their medical bills and leave something to their families. But the system has apparently failed to implement this law effectively. In so doing, it has essentially turned its back on these unsung heroes of the Cold War.

I have traveled to New York and met with these workers and the United States government owes them their due in compensation.

When thousands of people apply to a program and the vast majority are rejected, something is not right. The point of this program was to say thank you to these people who sacrificed themselves in order to protect America.

We now have the obligation to assist them in gaining compensation for their sacrifice. It is my sincerest hope that this hearing will serve as a means to creating a program that runs with greater efficiency and accountability.

PREPARED STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR
FROM OHIO

Mr. Chairman, I would like to express my appreciation to you for holding this hearing this morning to discuss the oversight of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

Since the end of World War II, at facilities all across America, tens of thousands of dedicated men and women in our civilian federal and contract workforce helped keep our military fully supplied and our nation fully prepared to face any threat from our adversaries around the world by developing and building our nation's nuclear weapons stockpile. The success of these workers in meeting this challenge is measured in part with the end of the Cold War and the collapse of the Soviet Union.

However, for many of these workers, their success came at a high price. They sacrificed their health, and even their lives—in many instances without knowing the risks they were facing—to preserve our liberty. I believe these men and women have paid a high price for our freedom, and in their time of need, this nation has a moral obligation to provide some financial and medical assistance to these Cold War veterans.

To meet that goal, I worked with a bipartisan group of my colleagues three years ago to create a program that would provide financial compensation to Department of Energy contract workers whose impaired health has been caused by exposure to beryllium, radiation or other hazardous substances. Our bill also provides that compensation be paid to survivors of workers who have died and suffered from an illness resulting from exposure to these substances.

Under EEOICPA, a federal program was created for workers suffering from beryllium disease, silicosis or cancer due to radiation exposure because of their work in out national security programs. Workers suffering from illnesses due to other chemical exposures are to be covered under state workers compensation programs. The Department of Energy's Office of Workers' Compensation Advocate was to help em-

employees apply for compensation with their particular state's worker compensation program.

The Department of Labor was assigned primary responsibility for administering and adjudicating claims for compensation for cancer caused by radiation, beryllium disease and certain other conditions under Part B of the Act. Part B also tasked the National Institute of Occupational Safety and Health with the responsibility to perform dose reconstruction for claims of cancer caused by radiation.

Under Part D, the Department of Energy would assist claimants filing for compensation through state worker compensation programs if a physicians panel found an occupational illness caused by chemical or other toxic exposure at a DOE site. Additionally, DOE was required to instruct the DOE operating contractor involved not to contest the validity of this claim.

The compromise package that was ultimately agreed to by Congress and signed into law was not what I originally supported. In 2000, I introduced S. 2519, which called for a federal program administered entirely by the Department of Labor. During congressional negotiations on the language authorizing EEOICPA, I agreed to this multi-agency concept in order to reach a compromise creating the program.

I was skeptical of the capability of the Department of Energy to administer this program because of their lack of experience in administering worker compensation programs. Additionally, I was concerned about the role of state Bureau's of Worker Compensation outlined in Part D. As a former Governor, I was doubtful that a federal program such as this would be able to work with each individual state program.

Three years after enactment, the Department of Energy is experiencing significant delays in developing claims. According to information released publicly, while almost 21,000 claims have been received by the Department, only 800 claims have been developed and 109 claims have been reviewed by the physicians panels and returned to DOE and the claimant. While I recognize that it took time to develop and publish the regulations, as long as there are delays in reviewing claims, there will continue to be delays in compensating workers who are entitled to this compensation.

I believe that today's hearing is an important step in congressional oversight into this program. I am confident that this hearing will lead to legislative improvements to the existing program.

I recently supported Senator Grassley's attempt to move administration of Part D from the DOE to the DOL. DOL has significant experience in administering worker compensation programs. Unfortunately, that language was not included in the Energy and Water Appropriations conference report which passed earlier this week.

Additionally, I believe that Congress must take action to address the so-called willing payor issue. I understand that it will be difficult for DOE to fulfill congressional intent in Ohio because there is not a contractor in place at the sites in Ohio that can be compelled to pay the claims. In response, the Ohio Bureau of Workers' Compensation (OBWC) has submitted a proposal to the Department suggesting that OBWC serve as a contractor for DOE in the absence of a viable, self-insured employer contractor. Unfortunately, DOE determined that they were unable to enter into such an agreement with a state because of limitations in the law. It is imperative that Congress consider creative solutions such as this to the willing payor problem as we look at the administration of this program.

I am pleased that the Energy Committee is holding this hearing today. I believe it is important for Congress to reconsider the role DOE plays in administering EEOICPA. I also firmly believe that legislative changes are necessary to address many of the problems my constituents, and thousands like them nationwide, have experienced in applying for compensation.

I look forward to working with my colleagues in the coming year to address these short-comings in the original bill.

Thank you.

STATEMENT OF HON. CHARLES E. GRASSLEY, U.S. SENATOR FROM IOWA

Senator GRASSLEY. Thank you very much for holding this oversight hearing. This is a first step, I hope, to resolving the problems that you have described.

Congress passed the Energy Employees Occupational Illness Compensation Act to provide benefits and compensation to employees and contractors of the Energy Department who developed cancer. Subtitle B of that act is administered by the Department of

Labor. It provides a lump sum payment to former employees of certain illnesses. Subtitle D is administered by the Department of Energy as opposed to the Department of Labor in the other case. It is intended to help former employees and contractors to file State worker compensation claims for illnesses from this exposure.

The Federal Government's implementation of this program has been an insult to the Americans who served our country working at this ammunition plants for our military. These people worked in ultra-hazardous facilities assembling nuclear deterrent during the Cold War.

There are two facilities in my State of Iowa that are covered by subtitle D. To date over 600 claims have been filed by former employees of the Army plant located at Middletown, Iowa. In Iowa these former ammunition plant workers may have been made ill and some of them made terminally ill by exposure to toxic substances. To the best of my knowledge, not one of these 600 claims has been reviewed by a physicians panel at Energy. Instead, Iowans who are sick and battling life-threatening illnesses are left to wait and rely on what have so far been empty promises from the Department.

The Federal Government has told these veterans of the Cold War that help is on the way, but reality is that the prospects of meaningful assistance from Energy does not appear any closer today than it did the day that Congress passed the law. Let me tell you why I say that. According to the information of the Department of Energy, between August 2002 year when the Department of Energy finalized its rules and April 2003 a mere 14, just 14, of 15,000 claims had been processed to the physicians panel. In addition, in April 2003 the Department of Energy had not even touched almost half the 15,000 claims because fewer than 15 claims were being processed every week.

When I learned of this situation in April, I immediately contacted Secretary Abraham. He said the goal was to be able to render final determination on 100 claims per week by August this year. 3 months later in July, I discovered that the Department was processing fewer than 40 claims per week. What is more, the Department of Energy had by now received almost 19,000 claims. Of these 19,000 claims, more than 10,000 of them had never been touched and only 53 claims had made it to the physicians panel.

So I asked more questions. In late July, Under Secretary Bob Card told me that in order to reach the goal of processing 100 claims a week the Department of Energy would need another \$20 million on top of the current \$16 million. I also learned of a separate proposal within the Department of Energy to expedite the processing of all the backlog claims by reprogramming \$43 million.

Now, this made sense to me until I saw that the Department of Energy was still processing claims at an abysmally slow rate. On September 15, the General Accounting Office released findings from the investigation of the program. The findings of the GAO were stunning even though they were, unfortunately, not surprising. As of June 30, only 6 percent of the claims had been completely processed, more than 50 percent were untouched.

On top of it all, the GAO said that increased funding alone would probably not result in more timely determination. In other words, more money was not the solution to the problem of endless delays.

Clearly, the Department of Energy had a substandard operation when it came to implementing this compensation program. The people Congress wanted to help deserved so much better than they got.

In response, I offered an amendment in September with your colleague here Senator Murkowski co-sponsoring the amendment. It would have transferred the responsibility for processing claims under subtitle D from Energy to the Labor Department. There were two main reasons for making this change. One, the GAO had told us in its preliminary report that most of the claims made to the Department of Energy had also made claims with the Department of Labor. Two, the Department of Labor had demonstrated its competence in processing claims for four other such compensation programs.

There was strong bipartisan support in the Senate for the bill that Senator Murkowski and I had written. We got letters to the conferees on behalf of our amendment. Seven Senators added their signatures. Those Senators were members of this committee as well as others. Unfortunately, we were up against opposition from the Department of Energy, its contractor, and OMB. We could not overcome that opposition and our amendment was knocked out in the conference report.

The only public statement of opposition made by the Office of Management and Budget about the Grassley-Murkowski amendment was a letter from the Director to the House Appropriations Committee. In an October 16 letter, Director Bolton said: "The subtitle D program should work to help beneficiaries. The provisions would create an unworkable and overly complex administrative structure that may detract from the program's service delivery."

Now, remember at the time—remember that at this time the Department of Energy has fully processed only 81 of the now 20,000 claims. The Department of Energy has not even started working on more than 74 percent of the claims it has received. The General Accounting Office is estimating that the Department of Energy is going to need 7 years to work off the backlog. Yet we have OMB expressing concern that our amendment would "create an unworkable and overly complex administrative structure that may detract from the program's service delivery." Mr. Chairman, that is out of touch with reality.

I was not willing to give up and I asked the administration to commit to a reasonable benchmark if it could not support the Grassley-Murkowski amendment. Surely they could agree that the Department of Energy needed to demonstrate that it could do a better job. A letter from the OMB Director Bolton on November 6 stated that the Department of Energy had committed to the full process—to fully process 25 percent or more of the existing part D claims within 6 months of receiving funding for the fiscal year.

So how high is a benchmark of 25 percent in 6 months? It is snail's pace. It is an insult to the Americans who worked at these plants. It is an insult to their family members who are left behind. Processing 25 percent of the claims in 6 months is about 156 per

week. To clear the backlog, the Department of Energy needs to process 288 claims a week. So I am not going to applaud the Department of Energy's 6 months down the road program because it manages to process just 25 percent of them.

I hope that the committee is beginning then to understand the frustration that I have experienced and Senator Murkowski has experienced with the Department of Energy's failure to take responsibility for this abysmal performance. I will note that it is not just my opinion or even the findings of the General Accounting Office. The Department of Energy hired an independent consultant, the Hays Group, to assess the compensation program and to make recommendations for improvement. The findings of the Hays Group further reinforced the need to move claims processing from the Department of Energy to the Department of Labor, as the Grassley-Murkowski amendment sought to do.

Many of the nearly 50 recommendations in the draft Hays report are what I call no-brainer recommendations. Overall, the Hays report says this compensation program was set up all wrong in the first place and it is too late to fix it, so now we have to make do with some sort of a flawed system. The Hays report says that the Department of Energy uses at least three different computer systems to process claims, but those computer systems do not talk to each other.

In addition, the Hays report debunks one of the myths used to oppose the Grassley-Murkowski domestic. Some argued that my amendment would not help the supposed backlog at the physicians panel. The draft report found that only 60 of the 105 doctors available for the physicians panel were working. I do not know why you have a backlog when about half of the doctors do not have to work to do it.

Finally, the report says "When making recommendations for the system, we cannot focus on a simply amplification of resources in the existing process." The statement is consultant-speak for, in my words, more money alone is not going to fix the problem.

I have dedicated a majority of my time today to describe what I believe are fundamental flaws in the Department of Energy's ability to process claims efficiently and effectively. Unfortunately, there are other problems. One of those is the matter of a lack of a willing payor in many States, including my State of Iowa. The lack of a willing payor likely will prevent a significant number of eligible claimants ever receiving compensation.

First, we need to get to the bottom of the problem created by the bureaucratic maze at the Department of Energy. The bottom line is that they are ill equipped to deal with this compensation program. It has demonstrated that time and again.

I am willing to keep challenging bureaucrats, fighting for amendments, and making the case to leaders who serve on this committee as long as it takes. In the meantime, we have former nuclear ammunition plant workers and their survivors who do not have the help they are owed or even an answer of yes or no, and that is not right.

Again, this hearing is an important step forward and I thank you for having it.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY,
U.S. SENATOR FROM IOWA

Thank you for holding this oversight hearing and inviting my testimony. Chairman Domenici and others on your committee have expressed their commitment to resolving problems with the Energy Employees Occupational Illness Compensation program. This hearing is a first step. In addition to my testimony, I would like to respond to questions that anyone on this committee has for me in writing.

Congress passed the Energy Employees Occupational Illness Compensation Act of 2000 to provide benefits and compensation to employees and contractors of the Department of Energy who developed cancer and other illnesses after they were exposed to toxic substances or radiation through their work. Subtitle B of that act is administered by the Department of Labor. It provides a lump-sum payment to former employees and contractors for certain illnesses.

Subtitle D is administered by the Department of Energy. It is intended to help former employees and contractors to file state workers compensation claims for illnesses that were caused by exposure to toxic substances. The subject of today's hearing is Subtitle D and mismanagement of it by the Department of Energy. The federal government's implementation of this program has been an insult to the Americans who served our country working the ammunition plants of the U.S. military. These people worked in ultra-hazardous facilities assembling our nation's nuclear deterrent during the Cold War.

There are two facilities in Iowa that are covered under Subtitle D of the Act. There are many more in at least 15 other states across the country. To date, over 600 claims have been filed by former employees of the Army Ammunition Plant located in Middletown, Iowa. In Iowa, these former ammunition plant workers may have been made ill—and some of them made terminally ill—by exposure to toxic substances at the plant. To the best of my knowledge, not one of these 600 claims has been reviewed by a physician panel of the Department of Energy. Instead, the Iowans who are sick and battling life-threatening illnesses are left to wait and rely on what have so far been empty promises from the Department of Energy.

The federal government has told these veterans of the Cold War that help is on the way. But the reality is that the prospect of meaningful assistance from the Department of Energy does not appear any closer today than it did the day Congress passed the law.

Let me tell you why I say that. According to information from the Department of Energy, between August 2002—when the Department of Energy finalized its rule and April 2003, a mere 14 of 15,000 claims had been processed to the physician panels. In addition, on April 1, 2003, the Department of Energy had not even touched almost half of the 15,000 claims because fewer than 15 claims were being processed every week. At that rate, it would take about 20 years for the Department of Energy to get through these claims. That's unacceptable.

When I learned of this situation in April, I immediately contacted the Secretary of Energy. I wanted to let him know that the situation had to be fixed and that I wanted to help fix it. Secretary Abraham expressed his support for the program and his commitment to fully implement the law in a way that was both efficient and effective. He also said that the Department of Energy had made progress in developing a system to gather information and process applications. He said the goal was to be able to render final determinations on 100 claims per week by August 2003.

Three months later, in July, I discovered that the Department of Energy was processing fewer than 40 claims a week. What's more, the Department of Energy had by now received almost 19,000 claims altogether. Of these 19,000 claims, more than 10,000 of them had never been touched. And, only 53 claims had made it to the physician panels.

So I asked more questions. In late July, Energy Under-Secretary Bob Card told me that in order to reach the goal of processing 100 claims a week, the Department of Energy would need another \$20 million on top of its current budget of \$16 million. I also learned of a separate proposal within the Department of Energy to expedite the processing of all the backlogged claims by re-programming \$43 million. This proposal said that by using \$16 million in fiscal year 2004 funds plus \$43 million in reprogrammed funds, the Department of Energy could clear every claim in one year. Now this made sense to me until I saw that the Department of Energy was still processing claims at an abysmally slow rate.

On September 15, the independent General Accounting Office released preliminary findings from its investigation of the program. Subtitle D required that the General Accounting Office assess the effectiveness of the benefit program. I had also asked the General Accounting Office to look at the program and the Department

of Energy's performance. The findings of the General Accounting Office were stunning even though they were unfortunately not surprising. As of June 30, only six percent of claims had been completely processed. More than 50 percent were untouched. More than 90 percent of claims filed after September 2002 remain untouched.

On top of it all, the General Accounting Office said that increased funding alone would probably not result in more timely determination. In other words, more money was not the solution to the problem of endless delays.

Clearly, the Department of Energy had a sub-standard operation when it came to implementing this important compensation program. The people Congress wanted to help deserved so much better.

In response, I offered an amendment in September to the Energy and Water appropriations bill. Sen. Lisa Murkowski co-sponsored this amendment. It would have transferred the responsibility for processing claims under Subtitle D from the Department of Energy to the Department of Labor. There were two main reasons to make this change. One, the General Accounting Office had told us in its preliminary report that most of the claims made to the Department of Energy had also made claims with the Department of Labor. Two, the Department of Labor had demonstrated its competence in processing claims for four other such compensation programs. For example, under Subtitle B of the Energy Employees Occupational Illness Compensation program, the Department of Labor has closed more than 94 percent of the 35,000 cases filed.

The Grassley-Murkowski amendment was accepted by the two managers of the appropriations bill. They agreed to both authorize and fund the Department of Labor to administer Subtitle D. They agreed that the Department of Energy should transfer every record to the Department of Labor. The Senate voted on the bill and we continued to fine tune the amendment so that there would be no delay in transferring these responsibilities. We worked hard to accommodate the technical recommendations made by officials from the Department of Labor. We wanted to make sure the amendment was just right.

By this time, there was strong bipartisan support in the Senate for making this transfer. Sen. Murkowski and I wrote a letter to conferees on behalf of our amendment, and seven senators added their signatures to our letter. Those senators were Sens. Voinovich, Bunning, Bingaman, Cantwell, DeWine, Kennedy and Hollings. I ask that our letter be placed in the committee record.*

Unfortunately, we were up against opposition from the Department of Energy, its contractor and the Office of Management and Budget. We could not overcome that opposition, and our amendment was knocked out of the conference report.

The only public statement of opposition made by the Office of Management and Budget about the Grassley-Murkowski amendment was a letter from the director to the House Appropriations Committee Chairman. In an October 16 letter, Director Bolton said that the administration would object strongly if our amendment was included in the final bill. His letter said, "The Subtitle D program should work to help beneficiaries, but the provision would create an unworkable and overly complex administrative structure that may detract from the program's service delivery."

Now, remember that at this time the Department of Energy has fully processed only 81 of the now 20,000. The Department of Energy hasn't even started what it calls claims development on more than 74 percent of the claims it had received. The General Accounting Office is estimating that the Department of Energy is going to need seven years to work off the backlog. Yet, we have the Office of Management and Budget expressing concern that our amendment would "create an unworkable and overly complex administrative structure that may detract from the program's service delivery." Mr. Chairman, that is out of touch with reality.

I wasn't willing to give up, and I asked the administration to commit to a reasonable benchmark if it could not support the Grassley-Murkowski amendment. Surely they could agree that the Department of Energy needed to demonstrate that it could do a better job. I got a response on November 6 in a letter from the Office of Management and Budget. Director Bolten wrote that the Department of Energy had committed to fully process 25 percent or more of the existing Part D claims within six months of receiving funding for fiscal year 2004.

Now, keep in mind that the Department of Energy had said in July that its goal was to process all 15,000 backlogged claims in one year by reprogramming \$43 million. Congress had already approved \$9.7 million and is likely to approve the remaining \$33 million request when it's received. At this rate, one might expect the Department of Energy to process all claims in one year.

*The letter has been retained in committee files.

So, how high is a benchmark of 25 percent in six months? It's a snail's pace. It's an insult to the Americans who worked in these plants. It's an insult to their family members who are left behind. Processing 25 percent of claims in six months is about 156 claims a week. To clear the backlog, the Department of Energy needs to process 288 claims a week. So, I'm not going to applaud the Department of Energy six months down the road because it manages to process 25 percent of the claims. Instead, I'm going to ask the Department of Energy how it intends to process an average of 469 claims a week during the next six months to clear the backlog within its own time line.

I hope that the committee is beginning to understand the frustration I've experienced with the Department of Energy's failure to take responsibility for its abysmal performance. I'll note that it's not just my opinion or even the findings of the General Accounting Office.

The Department of Energy hired an independent consultant, the Hays Group, to assess this compensation program and make recommendations for improvements. The findings of the Hays Group further reinforce the need to move claims processing from the Department of Energy to the Department of Labor, as the Grassley-Murkowski amendment sought to do.

Many of the nearly 50 recommendations in the draft Hays report are what I call no-brainer recommendations. It's fair to ask why the Department of Energy and its contractor haven't been doing these things from the beginning.

Overall, the Hays report says this compensation program was set up all wrong in the first place, but it's too late to fix it, so now we have to make do with a flawed system. The Hays report says that the Department of Energy uses at least three different computer systems to process claims, but those computer systems don't talk with each other. Does that make any sense?

In addition, the Hayes Report debunks one of the myths used to oppose the Grassley-Murkowski amendment to move responsibility for processing claims to the Labor Department. Some argued that my amendment would not help the supposed backlog at the physician panels. Well, first, my amendment moved those panels to the Labor Department where they would be managed better. More importantly, the draft report found that only 60 of the 105 doctors available for the physician panels were working. I don't know why you have a backlog when about half the doctors don't have work to do.

Finally, the report states, "when making recommendations for the system, we can't focus on a simple amplification of resources in the existing process." That statement is consultant-speak for "more money alone is not going to fix the problem."

I've dedicated a majority of my time today to describe what I believe are the fundamental flaws in the Department of Energy's ability to process claims both efficiently and effectively. Unfortunately, there are other problems with this compensation program. One of those is the matter of a lack of a "willing payor" in many states, including Iowa. The lack of a "willing payor" likely will prevent a significant number of eligible claimants from ever receiving compensation.

But first we need to get to the bottom of the problem created by the bureaucratic maze that the Department of Energy has created. The bottom line is that the Department of Energy is ill-equipped to deal with this compensation program. It has demonstrated that reality time and again. I'm willing to keep challenging bureaucrats, fighting for amendments and making the case to the leaders who serve on this committee as long as it takes. But in the meantime, we have former nuclear ammunition plant workers and their survivors who don't have the help they owed or even an answer yes or no. That's not right.

Again, this hearing is an important step forward. The expert witnesses you've assembled will provide important testimony. I look forward to continuing to work with you and with the administration to fix this program. Thank you for the opportunity to testify today.

Senator BUNNING. Thank you, Chairman Grassley. We appreciate your testimony.

Senator GRASSLEY. Thank you very much.

Senator BUNNING. Now we will finish with our opening statements. Senator Murkowski, do you have an opening statement that you would like to present?

Senator MURKOWSKI. I do.

**STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR
FROM ALASKA**

Senator MURKOWSKI. Thank you, Mr. Chairman. I appreciate you holding the hearing this morning.

I would like to thank Chairman Domenici and certainly Senator Grassley for all of his hard work on this. As the chairman undoubtedly knows from my contacts with him and from numerous discussions between staff, this is a very important issue to me and to many Alaskans, and it was for this reason that I very willingly have been working with Senator Grassley to co-sponsor this Grassley-Murkowski amendment.

This amendment is intended to address one of the two major failures in the implementation of the Energy Employees Occupational Illness Compensation Act. That is the extremely slow pace of processing by the Department of Energy of claims filed under subtitle D of that act. If we are not able to pass the Grassley-Murkowski amendment this session, I expect that we will return to this issue certainly in January.

The other critical problem with the act, one which we must also address and Senator Grassley mentioned at the end of his comments, is this willing payor issue. We must make sure that claimants found eligible for benefits are promptly compensated. Currently we have Alaskans who are found eligible for compensation, they are finding that their claims are being aggressively contested by attorneys for the insurance companies of the DOE's Amchitka contractors.

When we look at who these Alaskan claimants are, they are older widows of Amchitka workers or seriously ill former workers. They are facing countless hours of depositions, prehearings, document requests, and other litigation tactics. In many cases we have had Alaskans dying while waiting for their claims to be resolved. Essentially, they are being litigated to death, which is absolutely unacceptable, just unacceptable.

Now, Mr. Chairman, Senator Grassley spoke as well as you did about some of just the cold hard numbers that are involved here, the number of claims that have been submitted versus the number of claims that have actually been processed. When we look at the numbers and the statistics, they are not acceptable. They do not work.

But rather than reiterating some of the facts that you have mentioned and that have been mentioned by Senator Grassley, I want to put on the record this morning a more personal set of facts. I want to read some excerpts quickly from one survivor of a nuclear worker from Alaska. This is a woman by the name of Sylvia Carlson. Mrs. Carlson's husband was a mineshaft worker on the Project Canakin at the Amchitka nuclear test site in 1970-71. He was exposed to ionizing radiation in the course of his employment for a prime contractor of the Atomic Energy Commission. He was 32 years old at the time of his exposure. He died before his 41st birthday in 1979 of colon cancer.

Mrs. Carlson filed a Congress for workers comp under the Alaska Workers Comp Act, as suggested by DOE. I am going to quote from her statement, which I will ask the chairman to include in the record for this hearing. I will also ask the chairman to include a

similar statement from Bev Ellick, who is another widow of an Amchitka worker.

Mrs. Carlson says this:

I was assured by DOE that the contractor would be notified and asked to accept primary liability for my claim and would also be asked not to raise any affirmative defenses in my case. The exact opposite of DOE's letter and determination occurred. My workers compensation claim is being aggressively opposed by two different attorneys representing two different insurance carriers, the contractor and adjusters.

I requested information from DOE Secretary Abraham about DOE's not contacting the contractor. I did not receive an answer to my inquiry. I was informed 6 months after my inquiry via e-mail from Tom Rello, Director, Office of Worker Advocacy, that his office would not be able to give further assistance.

In the meantime, I have spent countless hours in depositions, prehearings, conferences, and meetings in defense of my workers compensation claim. I have also had to meet demands from opposing counsel for volumes of documents, which has imposed a financial burden on me. If the Alaska Workers Compensation Board rules in my favor, I have been assured that the opposing attorneys fully intend to appeal the decision to Alaska's Supreme Court, thus tying up my claim for at least 2 to 4 years.

This has been the experience of an Alaska widow of a nuclear test facility worker. Her claim—Mrs. Carlson was found eligible for compensation. Her husband's illness and death was determined to have resulted from his work at Amchitka. This kind of treatment was not what Congress had contemplated for survivors when it passed the act.

Mrs. Carlson further goes on to state:

Since January 2003, nine former Amchitka workers have died, all of cancer, and none to my knowledge have received benefits under subtitle D. The tragedy is that many more will follow. I am aware of at least 150 claimants who are awaiting responses from DOE. Opposing attorneys are not even waiting for those claimants to receive a physicians panel determination. A number of Amchitka claimants have been receiving demands for medical records, for social security records, for other information, and many of those claimants are very ill and unable to respond.

Over 90 days ago, seven Amchitka claimants were told by DOE that they would be receiving their physicians panel determinations within a few days. Since then DOE has told each a different story, i.e., the physician doing the determination is ill, the physician reviewing your case died, the person handling your case went on vacation, and we cannot find your records.

I would like to reiterate that nearly all the Amchitka claimants are ill with cancer, many unable to even make inquiries about the status of their claims, and all are being completely stressed by the tactics used by the opposing attorneys.

Mrs. Carlson concludes her statement by contrasting DOE's claims processing with that of Department of Labor and she says:

In direct contrast to DOE's lack of performance under the act, the Department of Labor has managed its obligations under subtitle B with professionalism, sensitivity, and rapid response. For example, the Department of Labor became aware that Amchitka workers were experiencing problems with the medical cards it had issued to some of the claimants. DOL sent two of its staffers to Anchorage to resolve the problem.

In addition, when the DOL Director was informed that opposing attorneys in my case were raising affirmative defenses that involved subtitle D payments, he offered to send his legal counsel to Anchorage for the hearing. The law is quite clear that subtitle B payments are not considered offsets. However, opposing attorneys in my case are pressing the issue.

DOL representatives have not only been responsive to claimants, but, unlike DOE representatives, they have been honest and willing to assist wherever they can. Had DOL been given the responsibility for implementing the act, including processing of claims and resolving the willing payor issue, we would not be talking about the problems right now.

Mr. Chairman, I do have a full text of my comments which I would like to have submitted for the record, as well as the full statement of Mrs. Carlson and Mrs. Bev Ellick.

When we talk about the statistics, which are very, very compelling, we also need to recognize that behind each statistic is somebody who is trying to get their claim processed and to get on with their life, and that is what this legislation needs to do.

Thank you, Mr. Chairman.

[The prepared statement of Senator Murkowski follows:]

PREPARED STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

I'd like to thank Chairman Dominici for holding this hearing today on the implementation of the Energy Employees Occupational Illnesses Compensation Program Act. As the Chairman undoubtedly knows from my contacts with him and from the numerous discussions between our staffs, this is a very important issue to me and to many Alaskans. In fact, the importance of this issue led me to co-sponsor the Grassley-Murkowski amendment. The Grassley-Murkowski amendment is intended to address one of the two major failures in the implementation of the Energy Employees Compensation Act; that is, the extremely slow pace of processing by the Department of Energy of claims filed under Subpart D of that Act. If we are unable to pass Grassley-Murkowski this session, I expect we will address this issue when we return in January.

The other critical problem with the Act—one which we must also address—is the so-called “willing payor” issue. That is, we must make sure that claimants found eligible for benefits are promptly compensated. Currently, Alaskans who are found eligible for compensation are finding their claims aggressively contested by attorneys for the insurance companies of the DOE's Amchitka contractors. And who are these Alaskan claimants? In many cases these are older widows of Amchitka workers or seriously ill former workers who are facing countless hours of depositions, prehearings, document requests and other litigation tactics by well financed insurance defense counsel. In a number of instances, Alaskans have died while waiting for their claims to be resolved. They are quite literally being litigated to death. This is simply unacceptable. Let me repeat—this is unacceptable.

Mr. Chairman, as you know, we recently spent many days in this room debating various provisions of the Energy bill. We talked about the repeal of the Public Utility Holding Company Act and changes to certain provisions of the Public Utility Regulatory Policies Act. We discussed standard market design, RTOs, participant funding and—protecting native load. These are complex issues. Often, detailed economic theorem and modeling are helpful in understanding these matters. Indeed, we heard credible, persuasive and often opposing arguments on both sides of these issues.

Mr. Chairman, the Energy Employees Act is not complex. The facts concerning its implementation are not convoluted. Economic modeling is not necessary to understand what must be done. It is simply a matter of what is right. Alaskans—and citizens of many other states in our nation worked in nuclear facilities owned by the federal government in past decades. Their efforts helped America win the Cold War. Many of them have become ill and many have died as a result of their work in these facilities. Our nation owes them a debt of gratitude.

Congress clearly recognized this when it passed the Energy Employees Occupational Illness Compensation Program Act. Sadly, the implementation of a portion of that Act—Subpart D—has not been consistent with what is right and what Congress intended when it passed the Act. These workers and their survivors are entitled to far better treatment than many of them have endured.

Mr. Chairman, I generally don't like to talk about cold, hard numbers; particularly when we have an issue that has had such a devastating personal impact on so many Alaskans and other Americans. However, I believe that briefly discussing some cold, hard facts will help my colleagues understand why this issue is so important to me and why I co-sponsored the Grassley-Murkowski amendment.

- The Energy Employees Occupational Illnesses Compensation Program Act was passed in 2000. The Department of Labor implements Subpart B of the program and the Department of Energy implements Subpart D.
- In March 2003, DOE committed to the House Energy & Commerce Committee that it would be processing 100 claims per week by August 2003.
- As of October 10, 2003, DOE had sent only a total of 81 claims, that is less than 4/10ths of one percent, through its physicians panels for a final determina-

tion out of over 20,000 claims DOE has received—while spending around \$15 million on the program.

- DOE has not even commenced claims development on more than 74%—over 15,000, of the claims it has received.
- The GAO estimates DOE will need 7 years to work off its backlog.
- Conversely, the Department of Labor has completed processing work on almost 95% of the approximately 35,000 cases filed under Subpart B.

I recognize that the DOE just issued a press release saying they processed 106 claims last week and assigned responsibility for this program to Undersecretary Card. While this is encouraging, it is only one week's total. Even if the DOE is able to continue at this rate, it will still take them almost 4 years to complete their current backlog of claims.

Enough cold, hard facts. Let me tell you about one survivor of a nuclear worker from Alaska. Her name is Sylvia Carlsson. Ms. Carlsson's husband was a mine shaft worker on the Project Cannikin at the Amchitka nuclear test site in 1970 and 1971. He was exposed to ionizing radiation in the course of his employment for a prime contractor of the Atomic Energy Commission. He was 32 years old at the time of his exposure. He died before his 41st birthday in 1979 of colon cancer. Ms. Carlsson filed a claim for workers compensation under the Alaska Workers Compensation Act as suggested by DOE. Let me quote from her statement which I will ask the Chairman to include in the record of this hearing. I will also ask the Chairman to include a similar statement from Bev Aleck, another widow of an Amchitka worker. Ms. Carlsson states:

I was assured [by DOE] that the contractor would be notified and asked to accept primary liability for my claim and would also be asked not to raise any affirmative defenses in my case. The exact opposite of DOE's letter and determination occurred. My workers compensation claim is being aggressively opposed by two different attorneys representing two different insurance carriers, the contractor and adjusters. I requested information from DOE Secretary Abraham about DOE's not contacting the contractor. I did not receive an answer to my inquiry. I was informed six months after my inquiry via e-mail from Tom Rollow, Director, Office of Worker Advocacy that his office would not be able to give further assistance.

Ms. Carlsson continues:

In the meantime, I have spent countless hours in depositions, prehearings conferences and meetings in defense of my workers compensation claim. I have also had to meet demands from opposing counsel for volumes of documents which have imposed a financial burden on me. . . . If the Alaska Workers Compensation Board rules in my favor, I have been assured that the opposing attorneys fully intend to appeal the decision to Alaska's Supreme Court, thus tying up my claim for at least two to four years.

This has been the experience of an Alaskan widow of a nuclear test facility worker. Please remember, Ms. Carlsson was found eligible for compensation under the Energy Employees Compensation Act. Her husband's illness and death was determined to have resulted from his work at Amchitka. This was not the treatment Congress contemplated for survivors when it passed the Act.

Ms. Carlsson also discusses another issue important to this today's hearing. Her statement helps explain why I co-sponsored the Grassley-Murkowski amendment. As Ms. Carlsson states:

Since January 2003, nine former Amchitka workers have died, all of cancer and none to my knowledge having received benefits under Subtitle D of the EEOICPA. The tragedy is that many more will follow. I am aware of at least 150 claimants who are awaiting responses from DOE. Opposing attorneys are not even waiting for those claimants to receive a Physician's Panel Determination. A number of Amchitka claimants have been receiving demands for medical records, for social security records, for other information and many of those claimants are very ill and unable to respond.

Over 90 days ago, seven Amchitka claimants were told by DOE that they would be receiving their Physician Panel Determinations within a few days. Since then, DOE has told each a different story, i.e., the physician doing the determination is ill; the physician reviewing your case died; the person handling your case went on vacation and we can't find your records. I would like to reiterate that nearly all the Amchitka claimants are ill with cancer, many unable to even make inquiries about the status of their claims and all are becoming completely stressed by the tactics used by the opposing attorneys.

Ms. Carlsson concludes her statement contrasting DOE's claim's processing with that of Department of Labor:

In direct contrast to DOE's lack of performance under the EEOICPA, the Department of Labor has managed its obligations under Subtitle B with professionalism, sensitivity and rapid response. For example, the Department of Labor became aware that Amchitka workers were experiencing problems with the medical cards it had issued to some of the claimants. DOL sent two of its staffers to Anchorage to resolve the problems.

In addition, when the DOL Director was informed that opposing attorneys in my case were raising affirmative defenses that involved Subtitle B payments, he offered to send his legal counsel to Anchorage for the hearing. The law is quite clear that Subtitle B payments are not considered offsets; however, opposing attorneys in my case are pressing the issue. DOL representatives have not only been responsive to claimants, but unlike DOE representatives, they have been honest and willing to assist wherever they can. Had DOL been given the responsibility for implementing the EEOICPA including processing of claims and resolving the Willing Payer issue, we would not be talking about the problems right now.

Mr. Chairman, as I said at the beginning of my statement, I appreciate your holding this hearing. I look forward to hearing the witnesses testimony. However, after the hearing it is time for prompt action. We must address both the claims processing and the willing payor issues. The workers and their survivors deserve no less.

Senator BUNNING. Without objection, your full statement will be put into the record.

I would like to suggest that anyone who has a cell phone on either turn it off or leave the hearing, because we do not appreciate them going off and being answered during a hearing.

Senator Talent, you are up.

STATEMENT OF HON. JAMES M. TALENT, U.S. SENATOR FROM MISSOURI

Senator TALENT. Mr. Chairman, I had an opening statement prepared, but unfortunately it simply recounts a lot of the same facts and statistics with regard to Missouri people as we have already heard from Senator Grassley and Senator Murkowski, and I am not going to take the time of the subcommittee by doing that. I will just sum it up by saying in Missouri we have had 520 claims filed, some of them from people who were exposed to radiation of up to 2,400 times what would be considered acceptable today. 14 of those claims have been completed, which is at the 3 percent level. That is lower even than the national average.

You know, the only thing I can say, Mr. Chairman, it reminds me of the situation that we used to have with the Department of Veterans Affairs when we had such a long backlog in processing disability claims by veterans with service-connected disabilities, and the rather dark joke in the veterans community was what they were doing was spinning out the claims long enough, hoping that all the claimants would die and then they would not have to pay anything.

Now, Secretary Principi has done a great job of reducing that backlog at Veterans Affairs. I am hopeful of seeing the same kind of response and vigor in the Department of Energy in response to this problem, which obviously exists and which we are all talking about.

I would just like to ask unanimous consent that my full statement be put in the record, Mr. Chairman, along with an article

from the St. Louis Post-Dispatch about the situation for former employees of the Mallinckrodt Chemical Company.

[The prepared statement of Senator Talent follows:]

PREPARED STATEMENT OF HON. JAMES M. TALENT, U.S. SENATOR FROM MISSOURI

Mr. Chairman: Thank you for holding a much-needed hearing on the Department's E-E-O-I-C-P. This is an issue of great importance to me because it affects so many Missourians. In Missouri, 520 claims have been filed. Only 14 have been completed. In two years, only 14 have been completed.

I have real concerns regarding the pace at which the Department of Energy (DOE), Department of Labor (DOL), and the National Institute for Occupational Safety and Health (NIOSH) are processing these claims.

Over the past few months, I have received many complaints from former workers at Mallinckrodt Chemical Co. in St. Louis who received doses of radiation up to 2,400 times those considered acceptable today. These workers were exposed, in most instances unknowingly, to dangerous levels of radiation. Many of those who eventually developed cancer have already died before they could be compensated for their illness.

I have a recent article from the St. Louis Post-Dispatch that outlines the lax safety precautions at the plant. I would like to submit this for the record.

When this legislation passed, it was a great victory for these workers. However, government bureaucracy and red tape are preventing these individuals from obtaining the compensation that, without question, they deserve. There is no reason why, after two years, only 14 of 520 claims have been completed in Missouri. There is no reason why only six percent have been completed nationally. I recognize that many of these claims require some measure of research to verify or deny a worker's claim, but when less than three percent of the claims filed in my state have been completed in two years, that is inexcusable.

The Department's record here, tragically, reminds me of the backlog on disability claims filed by veterans to the Department of Veterans Affairs. The backlog prior to Sec. Principi's tenure was so bad that the dark joke among older veterans was that the Department was waiting them out, hoping they would pass away before the claims process, which oftentimes ran on for years, was completed. We must ensure that situation does not occur here.

I look forward to the testimony today and I look forward to continuing to monitor this important issue.

St. Louis Post-Dispatch, October 30, 2003

Cold War-era nuclear workers at Mallinckrodt Chemical Co. in St. Louis received doses of radiation up to 2,400 times those considered acceptable today, according to an unprecedented government report.

As high as that level is, incomplete data means that actual exposure levels at the defunct nuclear fuel facility north of downtown may have been even worse.

Dusty, sloppy and hazardous conditions were routine at Mallinckrodt's uranium-processing plant, which operated from 1942 to 1957, according to a report presented at a meeting in St. Louis on Wednesday. One section describes a worker scooping uranium by hand with a piece of cardboard because mechanized equipment had failed.

"I would characterize this as a pretty messy operation," said Jim Neton, a health physicist with the National Institute for Occupational Safety and Health, which ordered the report as part of a federal nuclear workers' compensation program.

No more detailed collection of data about radiation exposure at the site has ever been produced. The 125-page document will help determine whether hundreds of sick, aging Mallinckrodt workers, some of whom are still living in Missouri and Illinois, are eligible for \$150,000 payments under the program.

Radiation has been linked to many types of cancer, even years after exposure. Despite the level of detail in the report, worker advocates and some officials said Wednesday that the report missed key information that could have revealed even more dangerous conditions.

A contractor relied on company data and government documents to create the report, but did not interview thousands of former workers or their survivors. Some workers claim their employer covered up accidents and fudged radiation tests.

Additionally, the report acknowledges that workers were not monitored for radiation exposure at all in the first three years the plant was open, from 1942 to 1945.

Only sketchy data exists for the next two years, until a full-scale health program was implemented in 1948.

Worker interviews should be factored into site profiles, an advisory panel overseeing the workers' compensation program said Wednesday. The Advisory Board on Radiation and Worker Health voted to ask NIOSH to develop a process for soliciting worker input before the profiles are released.

Failing to interview workers for the, reports "seriously undermines the credibility" of the workers' compensation program, said board member Dr. James Melius, director of the New York State Laborers Health and Safety Trust Fund.

The occupational safety institute already has released four site profiles and has 15 more pending. About 350 former nuclear sites nationwide are part of the compensation program, including eight other sites in the St. Louis region.

"The goal is to put these (site profiles) out as quickly as possible," said Larry Elliott, director of the Office of Compensation Analysis and Support within NIOSH. The sooner the site profiles are completed, the sooner claimants can get paid, he said.

Elliott called the site profile a "living document" and said that public comments are welcome.

Dolores Stuckenschneider, 68, of Ballwin, is one of the ex-workers who doesn't trust data collected by Mallinckrodt and the government. Stuckenschneider worked for nine years as a clerk at Mallinckrodt's downtown plant and at a plant at Weldon Spring. She was diagnosed with breast cancer in 1985.

According to the site profile, clerks like Stuckenschneider were assumed to work in an office and spend "some time" in the uranium production area. That description may not account for the polluted air and dust that Stuckenschneider said she encountered daily. "Every day, we had dust half an inch thick on our desks we had to clean off," she said at the meeting.

The plant was "as dusty as the dickens, and all we had was dust masks," said Bob Leach, a former worker who also lives in Ballwin. Leach said federal officials couldn't possibly create accurate exposure estimates.

James Mitulski of Farmington, Mo., said his father, Jim Mitulski, was told to shower repeatedly in order to bring his radiation reading down to an acceptable level. Only when his father was "clean" would company officials record an official radiation reading, the younger Mitulski said.

"You're not going to get a valid assessment of what was going on until you talk to the men," James Mitulski said.

The report considered 20,000 radiation film badge readings, 40,000 urine sample results and radon breath tests. Data could not be found for every worker, but federal officials say they can re-create exposure estimates by comparing data from workers in similar jobs, or by extrapolating data gathered at another time.

Senator BUNNING. Without objection.

Senator Alexander.

STATEMENT OF HON. LAMAR ALEXANDER, U.S. SENATOR FROM TENNESSEE

Senator ALEXANDER. Thanks, Mr. Chairman. Thanks for having the hearing and thanks for your leadership and that of Senators Grassley and Murkowski on this issue.

Early in World War II, President Roosevelt called Senator Kenneth B. McKeller of Tennessee down to the White House. He was chairman of the Appropriations Committee. He said: Mr. Chairman, we need to hide a billion dollars in the budget for a project that will win the war. Chairman McKeller, Senator McKeller, said to the President: That would be no problem, Mr. President; just where in Tennessee will this project be?

It turned out that that is how Oak Ridge, Tennessee, got started. Thousands of men and women who have worked at Oak Ridge during World War II today have always felt part of our national security system. They did help win the war with the Manhattan Project and they continue to be an important part of our national security system.

Many of them have described themselves as Cold War veterans. There are 3,700 Cold War veterans from Oak Ridge who are sick and who are getting the run-around from the Department of Energy, and it needs to stop. We have heard eloquent testimony already today, but just to put by comparisons the programs as they affect Tennesseans: In Tennessee there have been 3,762 claims filed with the Department of Energy, 7,208 claims filed with the Department of Labor. In the Department of Energy there are now 12 final decisions. In the Department of Labor there are 3,200 final decisions.

In the Department of Energy, of the Tennesseans who filed claims 104 cases are completed, 74 were deemed ineligible. Department of Labor, 305 recommended decisions. Department of Energy, no payments; Department of Labor, 1,506 payments totaling \$171 million.

I would like to ask to put into the record letters from two of those workers, Jeanine L. Anderson of Maryville, Tennessee, my home town, Harry Lee Williams of Oak Ridge, Tennessee, and to read just a paragraph or so from Ms. Anderson's letter is especially touching. She said she in 1978—"I began my employment as an administrative assistant at K-25, Oak Ridge Gaseous Diffusion Plant at Oak Ridge, Tennessee. It was always assumed that it was safe to work at Oak Ridge, that we knew what we were doing there." It turned out we did not when it comes to the safety of the men and women who were working there.

She lists various problems she has had as her health has deteriorated over time. She points out that she filed a claim 2 years ago and that she received her first response from the Department of Energy Office of Worker Advocacy 2 months ago. Her last paragraph says:

"My days are still filled with doctor appointments, medical testing, and physical therapy. I, like thousands of other nuclear workers, have become totally discouraged with the way the Department of Energy has handled their responsibilities. There has been a total disregard for these sick Cold War veterans who gave so much for their country and have received nothing but mere excuses from the Department of Energy as to why they have not helped yet, why their claims have been denied, or why DOE needs more funding and more time to handle these claims."

Mr. Chairman, this is a serious matter for a great many Tennesseans and a great many Americans. We should be treating our Cold War veterans with the same respect that they have treated our country and their employment.

Thank you.

Senator BUNNING. Would you like that all entered into the record?

Senator ALEXANDER. If this letter, the letter from Ms. Anderson, and the letter from Mr. Williams could be entered in the record.

Senator BUNNING. Without objection, so ordered.

Senator ALEXANDER. Thank you, Mr. Chairman.

Senator BUNNING. We will have the Honorable Robert G. Card, Under Secretary, Department of Energy, as the next panel.

Mr. Card, you may begin at any time.

STATEMENT OF ROBERT G. CARD, UNDER SECRETARY, DEPARTMENT OF ENERGY, ACCOMPANIED BY BEVERLY COOK, ASSISTANT SECRETARY FOR ENVIRONMENT, SAFETY AND HEALTH

Mr. CARD. Mr. Chairman, if it is all right with you I would like to have Assistant Secretary Cook, who will not be giving oral testimony, but will be here in case there are questions.

Senator BUNNING. There will be plenty of questions, so she can assist you at any time.

Mr. CARD. Good morning, Mr. Chairman and members of the committee. My name is Robert Card and I am the Under Secretary for the U.S. Department of Energy. I want to thank the committee for their interest in this important program, the Energy Employees Occupational Illness Compensation Program Act of 2003, and for providing the Department the opportunity to discuss our progress and challenges in implementing it.

I would like to make the following summary points from my written testimony that was submitted for the record. First, while significant improvements have been made in the program, DOE did not respond as quickly as it should have to the explosive growth in the number of claims filed. We now have met our initial improvement target of 100 claims per week, but that will be inadequate to deal with the near tripling of claims volume estimates made just 2 years ago, which was in turn higher than that contemplated in the legislation.

I think, to respond to many of the comments made this morning, what is important is the—actually, what I am going to do is—second, DOE is committed to make up the gap. However, it will need the help of this committee and Congress to do so. We will soon be seeking more than \$30 million in additional fiscal year 2004 funding and we are reviewing legislative improvements that could substantially expedite the processing rate—

Senator BUNNING. Mr. Card, would you please move the microphone a little closer to you. Thank you.

Mr. CARD. Thank you.

We note that, while the Department of Labor has done a commendable job of claims processing, its administrative funding has been nearly four times that of DOE. We intend to reduce this funding gap to dramatically expedite claims processing.

Third, DOE will exercise all options within its control to improve flow through the physicians panels, which have become the bottleneck now that we have improved our claims processing rate. An example of this would be to require only one or two physicians to initially review each case. Cases with initial negative determinations would still have access to all three physicians. Other examples have been provided in my written testimony.

Fourth, we need to work together with the Congress to do a better job of communicating what this program is about. As you know, part D of this act which we are discussing today contains no direct benefit to the employee. It only supports their application for State workers compensation, which the employee has a right to do with or without this law. It also directs DOE, where legal, to prevent DOE-funded challenges to the claim. We are concerned that many people confuse the Department of Labor-operated part B, which is

the federally funded benefits program, with the Department of Energy-operated part D, which is purely an assistance program.

Lastly, DOE has a responsibility to prevent the need for these types of programs in the future by better protecting our existing workforce. We take this responsibility seriously, and in that regard I am pleased to report that we have driven safety incidents and accidents to record lows. We have also held our aggregate exposure rates to low levels, in spite of the significantly increased work from the accelerated cleanup program. The accelerated cleanup program is achieving dramatic risk reductions for the communities that surround our sites in addition to site workforce.

I just want to close with saying that I personally feel for the workers that you are talking about. I worked, was one of them. I worked among them. So that is why in a way there is some emotion in this for me, and I am disappointed in the way that this has worked out and we are on track and I vow that we are going to fix it.

However, I also believe this is a very confusing issue and a lot of the comments we have heard this morning use different dates, different times, and different circumstances. So I look forward to responding to your questions and hopefully we can clear up where we are and where we are going.

Thank you.

[The prepared statement of Mr. Card follows:]

PREPARED STATEMENT OF ROBERT G. CARD, UNDER SECRETARY,
DEPARTMENT OF ENERGY

Thank you for the opportunity to testify about the Department of Energy's implementation of the Energy Employees Occupation Illness Compensation Program Act of 2000 (EEOICPA). Broadly speaking, DOE has two areas of responsibility under EEOICPA—(1) gathering employment and workplace information to assist the Department of Labor (DOL) and the Department of Health and Human Services (HHS) with their work in carrying out the EEOICPA Part 3 compensation program, and (2) implementation of EEOICPA Part D, which focuses on providing assistance to DOE contractor workers in their efforts to obtain State workers' compensation benefits. My testimony today will primarily focus on DOE'S activities under Part D.

DOE has heard loud and clear that Congress is frustrated with the pace at which we are processing Part D applications. We too are greatly concerned. Progress has been made in gathering records and processing cases. When Secretary Abraham spoke of this program last spring, we were processing less than 20 cases for physician panels a week. We have now exceeded 20 cases per day. However, in spite of these significant improvements, DOE simply has not processed cases with the speed or efficiency desired by the Congress or by Secretary Abraham. Therefore, I want to be very specific in my remarks to you today. The Department did not react quickly enough when it became apparent that the EEOICPA was a much larger program than originally anticipated. More resources are required.

Therefore, we will be providing a request for approval of another transfer of funds to the appropriate Congressional committees very shortly. I ask for your timely support of this transfer of funds. Also, I am asking that the Committee support changes to the statute that would assist us in expediting the physician panel process even further.

I have included an attachment* to my testimony that provides more detail concerning the issues I will discuss today, including some of the original expectations of the program, processes used by DOE and DOL to implement EEOICPA, our progress to date, and what we have learned from outside reviews of our work. I have also included information about the current safety record of DOE for your information.

Part D of EEOICPA sets up a somewhat cumbersome and complicated process that DOE'S contractor workers must navigate if they are to benefit from Part D of

*The attachment has been retained in committee files.

the program. If a DOE contractor worker believes they may have an illness caused by exposure to a toxic substance while working at a DOE facility, the law allows the worker to file an application with DOE for assistance in filing a state workers' compensation claim. After determining that the applicant is eligible for the Part D program, DOE gathers records from around the country relating to the workers' occupational histories and their health conditions, and then refers the application to a panel of doctors. The physician panel then determines whether the worker's illness arose from exposure to a toxic substance while working at a DOE facility.

If the panel finds in the affirmative and DOE finalizes the finding, the workers are notified of the favorable finding. The workers may choose to file a State workers' compensation claim. Of course, the workers are free to file with their State workers' compensation office at any time, but hopefully the case file put together for the worker by DOE plus the positive physician panel finding will provide the worker a better chance of receiving benefits through their State workers' compensation agency. The statute then allows DOE, to the extent permitted by law, to direct the contractor who employed these workers not to contest State workers' compensation benefits for workers that have received a positive finding. Individual States' workers' compensation laws and rules determine benefits for that particular state. The EEOICPA statute does not provide for direct monetary benefits to Part D applicants from the Federal government.

At the present time, DOE has received more than 20,000 Part D applications with applications continuing to be filed at approximately 150 per week. In addition, there are currently more than 40,000 applications filed under Part B, the DOL Federal entitlement portion of the program, for which DOE provides information.

This is in stark contrast to some of DOE's original expectations for EEOICPA. Secretary of Energy Richardson, in an April 2000 press release, stated "The Administration's proposal, if enacted into law by Congress, would compensate more than 3,000 workers with a broad range of work-related illnesses throughout the Energy Department's nuclear weapons complex." This was prior to the enactment of EEOICPA, but the release did discuss a program that was very similar to the current law, including lump sum benefits and help in obtaining State workers' compensation benefits.

The press release further identified the total program costs for all agencies, including administrative costs and worker benefits, to be about \$120 million annually over the first three years the program was fully operational, declining to about \$80 million per year after the backlog of claims was reduced. The basis for these estimates is not clear, but the implication is that it would take at least three years to clear a 3,000-claim backlog, and then several years beyond that to complete all claims. In fact, expected expenses for all of EEOICPA for all agencies just through fiscal year 2004 is expected to be \$1.5 billion.

DOE's budget projections for Part D in 2001, after the statute was passed, are based on a projection of about 7500 applications to DOE under Part D and 10 years to complete the program. Clearly, DOE expected significantly fewer applications to this program than we are currently receiving, and consequently fewer resources were requested. In fact, we have received nearly three times as many applications as originally projected when budgets profiles were developed.

Despite the fact that thousands more applications have been filed than were expected and despite the cumbersome processes established for Part D, DOE has worked very hard to carry out its Part D responsibilities. This work has occurred while we have also been obtaining and providing to the DOL and HHS the records for thousands of employees who have submitted Part B applications.

The Department has continuously worked to improve our processes. First, because the number of applications was far exceeding our original estimates, we sought in July 2003 and the Congress approved in October the transfer of an additional \$9.7 million in FY-03 money to be used for the DOE's activities in gathering records and processing Part D applications. As we already have discussed with many of you, we soon plan to seek approval for the transfer of more than \$30 million in additional funds in FY-04 to be used for this same purpose. These additional funds will go a long way towards allowing DOE to work off the large backlog of applications for which we are currently gathering records for physician panel review. In fact, we are now averaging 100 cases per week up to physician panel review. I have included statistics on our progress in the Attachment, and you can also see our weekly progress on the DOE Office of Worker Advocacy web site.

Second, several months ago DOE retained the Hays Group, Inc. to critically evaluate our Part D activities and suggest improvements and enhancements that would allow us to more effectively implement the Part D program. The Hays report is final, and is available on the Office of Worker Advocacy web site. I promise that we will work diligently to address the improvements identified in the report. We are

also interested in the suggestions of the General Accounting Office (GAO) after it completes its critical review of the Part D program.

Third, the Secretary has directed that I personally take charge of DOE'S implementation of its EEOICPA duties. I have recently made changes so that the Office of Worker Advocacy, the office that administers this program within DOE, will report to me directly.

We believe these funding and programmatic initiatives will go far towards expediting the processing of Part D applications that have been filed with DOE. We believe that these approaches are preferable to moving the administration of some parts of the Part D processing work to another agency, as was recently proposed as an amendment to the Energy and Water Appropriations Rill. DOE and its contractors possess the employment and exposure records for Part D applicants, and DOE has spent almost three years carrying out Congress's directive to DOE to develop the processes and procedures to gather records and implement the Part D program. Moving portions of the program will not accelerate the processing of applications, and will, in my opinion, counteract the progress we have made to date.

While we believe that our recent efforts to speed the processing of Part D cases puts us on the right path to accommodate the large number of backlogged claims, we believe more can be done. Additional resources are certainly required. However, we are also evaluating DOE'S Federal Rule that implements Part D to determine whether it might be appropriate to propose changes that could expedite the processing of Part D applications, especially in the area of physician panel reviews.

Finally, and as I noted earlier, the EEOICPA statute itself places a number of constraints and limitations on the Part D process that serve to slow down the pace at which DOE can process applications. A good example is the physician panels. Current statutory requirements may limit the population of physicians below a tenable level for the sufficiently speedy processing of applications through the panels, a problem which may be exacerbated by the Department's Rule requiring three physicians on every panel. We are exploring with other Executive agencies legislative changes that may be needed to make more physicians available for panels, as well as developing possible changes to DOE Rules to best utilize the physicians we have. The statute also caps the level of pay for physician panel members at a level well below the market rate for such services. An initial description of those barriers that may benefit from legislative changes is included in the attachment.

The statute contains other limitations that have been barriers to the processing of Part D applications. A table listing many of the barriers and possible changes is provided in the Attachment. I am looking for support from this committee as we evaluate the effectiveness of making these changes to deal with these barriers.

I also look forward to hearing any suggestions the next panel may have for improving DOE'S implementation of Part U, within the existing statutory constraints and requirements. Various parties sometimes present recommendations to DOE about how its Part D processes might be changed, but often those recommendations ignore the limitations placed on us by the statute itself. In addition, some of these recommendations seem unaware of where the Department's responsibilities lay, a misperception that I believe is widespread throughout the community of former workers and those interested in their cases.

The fact of the matter is that the Department of Energy's responsibilities end, by statute, when the Department provides the Physician Review Panel findings to the worker, and where allowed, direct the contract employer to not contest the findings or claim with State workers' compensation agencies. No benefit is tied to this program, only the advocacy services of the Department. All benefits are determined in accordance with an individual State's workers' Compensation rules. We appreciate any suggestions and recommendations from any party that respects the boundaries as set by the Congress.

DOE is committed to carrying out its responsibilities under EEOICPA Part D. We are committed to providing DOE contractor workers with the assistance they deserve under Part D as established by the Congress. In addition, we are committed to working with the Congress, to keep you informed about our progress and to address improvements in DOE'S processes and in the statute itself.

I also want to assure all members of this committee that the Department of Energy as an agency and I personally as the Under Secretary of Energy believe that the safety of our workers is our most important responsibility. We do not want to leave an additional trail of injured and ill workers with legacy costs for the taxpayers. This is why I have included some of the safety statistics regarding our current operations in the Attachment. The DOE injury and illness rates have declined to a historic low in 2003. Our rates are less than half of private industry. DOE is one the safest places to work in the country. We fully intend to continue

this performance while striving to improve our methods of protecting our workers, the public and the environment.

At this time, I would be glad to answer any questions you may have.

Senator BUNNING. Thank you for your testimony.

I will start off the questioning because I have got so many I do not think I can get them all in in the 5 minutes. Please put me on the same 5 minutes.

The only one who seems to be confused is the Department of Energy in regards to the law that was written. As of November 10, 2003, the Paducah plant has had 2,445 applications filed with the Department of Energy under subtitle D. The DOE has sent one—one—of these claims to the physicians panel, one, with 82 having been found ineligible or withdrawn.

Some of my constituents filed their claims more than 3 years ago and are still waiting to hear about whether they will qualify for benefits. Why, Mr. Card, has it taken so long for the Department of Energy to process claims at the Paducah plant?

Mr. CARD. First I would lay it out, the original estimates for this program had substantially fewer claims anticipated and a longer time frame for processing them. I think perhaps the case was because this is not the benefits part of the program, but assistance with a right the workers already had. It is clear that expectation was not acceptable in today's environment and we are trying to respond to it.

Initial estimates were as low as 3,000 claims and 7,500 I think were anticipated shortly after the law was passed. We are at 20,000 now and seeing 150-plus per weeks still coming in. As I said in my testimony, the Department was too slow to recognize the change in the size of the program and the change in expectations of how fast was acceptable. We are trying to address that now.

I think our recent progress—there is a graph in the testimony that shows that we are making substantial progress now that we have more funding. I think funding is an absolutely essential key issue here, and I would comment that when we get the funding we also need time to complete the hiring process and staffing to make that work. So to comment, to just add to Senator Grassley's comment, the reason why we said 25 percent in 6 months is we cannot just turn on the spigot and all of a sudden people show up and are trained tomorrow. We have to get that infrastructure established.

We now have an infrastructure established that we believe confidently we can process 100 per week, 5,000 a year. So these early claims should be getting worked off and already there is more progress than are in your records at Paducah, but they are nothing to brag about yet.

Senator BUNNING. In February of this year, Secretary Abraham testified before this committee and told me that by August the Department of Energy was going to process 100 claims per week. Those are his words. Only last week, coincidentally right before this hearing, did the Department meet this goal. The GAO estimates that if the Department processes 100 claims per week it will take 4 years for it to process the backlog of claims.

Does the Department expect that it can continue to process 100 claims per week? How much more will the Department commit to processing and eliminating the backlog?

Mr. CARD. Obviously, 100 cases a week will not work the backlog off because we are receiving more than that. The Secretary made a commitment and we made a commitment to him internally that within 12 months of receiving full funding, which would be included in this reprogramming request, we would process all of the then-current backlog of 15,000 claims within 12 months. We believe we can do that.

Senator BUNNING. 15,000?

Mr. CARD. Within 12 months of receiving the \$30 million.

Senator BUNNING. In other words, of the 2,400-plus that we have filed at Paducah and one has been settled—

Mr. CARD. All these Paducah claims that were filed at the time of that hearing should be to the physicians panels and hopefully, with our work with the physicians panels, through—

Senator BUNNING. You are telling me all 2400 applications?

Mr. CARD. I believe these 2,400 were largely filed at the time of the hearing, so our commitment was the cases that were filed at the time of that hearing would be done 12 months after we receive funding.

Senator BUNNING. That is just—go ahead, Senator Murkowski. And I am going to hold the 5-minute rule so we can go back and forth.

Senator MURKOWSKI. I appreciate it. Thank you, Mr. Chairman.

Mr. Card, you have mentioned that perhaps this is confusing because we are talking about different dates, different circumstances, different numbers. So I want to just keep my questions as they relate to my Alaskan constituent. You have heard about Mrs. Carlson's situation with her husband and his death. It has been confirmed. There is no disputing. She is eligible.

Yet you heard her statement that she was informed 6 months after her inquiry that there would be no assistance given to her and now she is facing this series of litigation, deposition, pre-hearing. You have indicated that there are several things that you need. You need the funding, you have suggested perhaps reducing the number of physicians to expedite things.

But the third one, you said we need to communicate what this program is about. This program, subtitle D, is about assistance. Well, Mrs. Carlson has asked for assistance and she has been told: Sorry, you are out of luck. Can you explain exactly what DOE is doing to assist these claimants, my Alaskan claimant Mrs. Carlson, who has received a positive physicians panel determination, in her effort to get compensation under subtitle D?

Mr. CARD. Sure. And you bring up a very important point. The law sets out a framework where our assistance is preparing packages like these [indicating]—and we can go into those and the difficulty of putting those together—for people like Mrs. Carlson. When that package is done and the physicians panel has made the final determination, we read the laws that that is where our statutory authority stops at that point.

The applicant has the choice then of using that package, which hopefully provides more support than would have been available otherwise, to process their case through whatever the existing State workers compensation system is. It does not appear that the

law contemplated us then working through the actual State workers compensation process.

It is my understanding that Mrs. Carlson, who you pointed out was a part B recipient, asked us for legal help in prosecuting her claim. While that might have been a wonderful thing to have provided, we clearly viewed it as out of bounds of what was intended for us to do in our authority.

Senator MURKOWSKI. Do you have, does DOE have, a specific individual who Alaskans can contact to determine the status of their claims and get other questions answered?

Mr. CARD. All individuals have access to a 1-800, or it is 888, I think, number, a toll-free number. Our web site is continuously being improved and my goal is to get it as good as FedEx or others like them, where people can follow their case every step of the way. We are a long ways there. But there are hot lines that are regularly used to find out where cases are and how to get in touch with us.

Senator MURKOWSKI. Well, there is a big difference between going to a 1-800 number and getting somebody who has never heard of you versus having a person in Kentucky, in Tennessee, in Alaska, that is working these claims. I would hope that you could be more personally responsive.

Can you explain what specific steps DOE has taken to establish a willing payor in Alaska?

Mr. CARD. What DOE has done is an extensive research of active contract vehicles that would allow us to, again within the framework that we view the statute laid out, to find a willing payor. So far we have not been able to find any active contract vehicles in Alaska for us to be able to help.

Senator MURKOWSKI. Have you advised the Alaskan claimants that there is no willing payor?

Mr. CARD. At this point we are unable to find one that we can put pressure on to engage.

Senator MURKOWSKI. So do the claimants who are making application, do they believe that there is a willing payor out there and that there will be some benefit in them moving forward with this application?

Mr. CARD. I do not specifically know the answer to that. All I know is that this program was set up for us to get them to the point where they can successfully engage, as successfully as possible, in that workers compensation program by having these medical histories. So I am certain there is a variety of expectations among the claimants, but I am not aware specifically of how many may or may not believe there is a willing payor when there is not.

Senator MURKOWSKI. Well, if there is not, I would certainly hope we are not leading people down a path that is obviously very difficult to have to go through if your spouse has died as a consequence of exposure, as Mrs. Carlson's husband. And if there is no expectation that—or there is no understanding that you are going to have a willing payor on the other end, I would certainly hope that we are not putting people down a path with unrealistic expectations.

Thank you, Mr. Chairman.

Senator BUNNING. Thank you.

Senator Talent.

Senator TALENT. Thank you, Mr. Chairman.

Mr. Card, in your testimony you said that there were about three times as many claims as you had anticipated; is that correct?

Mr. CARD. That was the anticipation 2 years ago, which was more than appeared to be—

Senator TALENT. Right, I understand. When the law passed the budget request you made was based on an assumption of about a third the number of claims that you have got. Are we on the same page here, about?

Mr. CARD. When we did our research and looked through the budget preparations for, I think it was, fiscal year 2002, it appeared that about 7,000 claims was what was anticipated, and that would be worked off over a number of years.

Senator TALENT. Well, in Missouri we have had 3 percent of the claims completed. So I mean, even if the claims had been at the level that you requested or, excuse me, that you anticipated, we would still have only 9 percent of the claims completed; and you would not suggest that that is an appropriate figure after 2 years, would you?

Mr. CARD. No, I am not defending the historical performance of the program.

Senator TALENT. Good, because what I am getting to is—and I have been around long enough now to have seen this a lot—there is some vast non-feasance by an agency, it just does not do its job, and then what we end up doing about it after all the complaining that happens on the Hill is we end up providing more money. So what happens is the agency by not doing its job gets more money.

What I would like to see is somebody held responsible, because it just seems to me that, even if it was inadequately funded—and I think maybe we should have funded it more—you could have done a better job than you did. I mean, 6 percent. There had to be something beyond just a lack of funding here.

I am loath to say you did a terrible job, so here is more money. I know we are going to have to do that, but to me that is not the right answer. You do not have to comment on it if you do not want to.

Mr. CARD. If you do not mind, I just encourage you, there is an attachment in here that compares the DOE budget and the DOL budget, simply the administrative, not the benefits portions, that I would encourage you to look at to make your own decision whether there has been adequate funding.

Senator TALENT. I am not saying the funding has been adequate. But I am saying that the performance has been inadequate even given the fact that there has been a funding shortfall. I would hope that there is some attempt to initiate management solutions, which ought to involve holding somebody responsible. I know that is not always easy to do, but, my gosh, I am sure that these workers would appreciate knowing that—if they performed this well on the job or this poorly on the job, they would not be confronting this situation because they would not have worked all those years that they worked, I will tell you that.

Let me ask you one other thing. Do you have any suggestions for what we ought to do as a government, either administratively or

statutorily, for the situation where there is not a willing payor? Because I mean, to be fair, that is probably a lot of the problem, when there is nobody you can direct to pay the claim, and then we have State agencies or funds or whatever contesting it. Do we need more legislative action here? What would you propose?

Mr. CARD. Well, that is a complex issue. There is a number of different benefits programs that DOE workers qualify for in addition to these. So if one was going to make that determination, it would seem that you would want to look at all the various benefits available and determine if there is a statistically significant group of people who are being underbenefited because of the way this is working. Then perhaps one would want to look at that.

But it is not clear to me right now in the total scheme of things—and part of the problem admittedly is we do not have enough data—that in fact these workers have not had access to the right, to adequate benefits in other vehicles. So at this time, until we get more experience with the program, we are not proposing a change in the benefit. But as I said in the testimony, we are actively looking at proposed legislative changes to the process that will enable us to expedite our processing.

Senator TALENT. Thank you, Mr. Chairman.

Senator BUNNING. Senator Alexander.

Senator ALEXANDER. Mr. Card, I would like to look to the future a little bit. Without assessing blame for the past, looking to the future, would one solution just be to give it all to the Department of Labor? I know they deal with different issues, but they apparently have a larger administrative budget, they seem to be doing a good job on what they are doing. You have lots of other things to do in your Department.

Looking at it from the point of view of, say, the 3,700 Tennessee claims that are filed and the 12 final decisions, the 104 cases completed, would it be easier and better for the claimants, not for you, to transfer it to Labor?

Mr. CARD. Senator, I took a hard look at the proposal, which was certainly well intended, to involve the Department of Labor in this. The problem that I came up with is the fundamental issue here is that data is possessed within the DOE system. So there was no way to cleanly hand this program over to anybody, and DOE was still going to—the hard part of the program was still going to rest with DOE and there is no logical way to make that separation.

So the way we thought that very well intended amendment is it would have simply added another interface point, which are already difficult issues in this program, and when we looked at the numbers that were being informally cast about for funding we also—we would have had no money left over to support doing that so the Department of Labor could have done what it was supposed to do. So it would have actually increased the funding requirement considerably.

So at the end of the day—and then there is the issue of new rules, do new rules need to be made, and will that put delays in the program? So when you look at the graph showing the ramp-up in processing rate now that we have office space and we are fully staffed at that rate, it looked to us like right as we are getting

ready to actually get moving on this thing that it might put a step change delay in the program.

Senator ALEXANDER. Well, let me ask this, then. Let us say you—and I respect the fact that you are a former worker yourself and you have a feeling about this. Let us say you are outside the Government right now and the administration and the Congress calls you in and says: We have got a mess here. We intended to apologize to our Cold War veterans and create a system whereby we could acknowledge what happened to them, but it is not working. We want it badly to work.

If you were to start from scratch today and say to us a way to change things so that it could be done better, what would you do?

Mr. CARD. If I was starting all over again today, I frankly would not be in a lot different place than we are today. I would not have got here the way we got here. I mean, I think we should have—this should have had a higher level of visibility. We should have recognized the institutional realities of this, that the 5 to 10-year processing time that was contemplated when this was passed was not going to be acceptable to our constituents, our joint constituents. We should have ramped up to the point we are now earlier.

Senator ALEXANDER. Would you have used—asked for a different process maybe? Based on what you have seen now, do we need all of these papers that are stacked up there?

Mr. CARD. There are limitations. There are limitations, particularly relating to the amount and type of physicians that we have access to, that we are concerned about in the statute. We are reviewing those inside the administration right now. I think we certainly would have addressed that earlier.

Our DOE rule, as we have said in the testimony, sets up a three-physician process which unnecessarily uses more resources than we probably need to do to get the job done. We have talked with the Department of Labor about their strategy of using cohorts or large aggregations of people, which we are going to take a hard look at.

The struggle I have, though, is that the Department of Labor program, remember, they are the judge, jury, witness, and everything. We are preparing this for an independent body over which we have no control to make a decision, and may be contested if we do not have influence.

Senator ALEXANDER. But my point, and I know I am about out of time, is if you were setting a different procedure, I mean if you came in and we all called you in and said, come in and take a look at this, we had a goal and the method we set up did not work—maybe it was because the Department did not do its job, maybe it was because the Congress set up a mechanism that was impractical. If it is impractical, I think it would help us if we were told that and told, instead of doing this, let us do that, and maybe there is something we could do about it.

Mr. CARD. We will have some recommendations for you.

Senator BUNNING. Thank you.

Missouri is at 3 percent. Kentucky is at .04 percent of claims filed. So we are still a little behind you, Jim.

Senator TALENT. If you only had a third of the claims you would be at 1.2 percent.

Senator BUNNING. There you go. We can make progress.

Even if the Department begins processing claims at a quicker pace, and you said you are doing that, the GAO has said that the current physicians panels can only handle 200 cases per month. At that rate it would take more than 7 years to process all current pending cases. That does not count any future cases that might be filed.

Can the DOE give any recommendations on how to fix the problem with the physicians panels, since half of them are working and half of the physicians are not working?

Mr. CARD. Okay. First of all, all physicians that are able to work today are working. So the number that was set—

Senator BUNNING. In other words, the people that you chose are incapable of work, or what was it?

Mr. CARD. We do not—the Department of Energy does not choose the physicians. We request the physicians. When the physicians are referred to us, then the physicians themselves get to decide when they want to work, what cases they want to take at that period of time.

Senator BUNNING. Then the pool could be bigger. Maybe you could make the pool bigger.

Mr. CARD. The current interpretation of the statute limits the pool size to a certain specialty which does not have a robust amount of physicians in it.

I will just walk down the steps that we are looking at to improve that process. First of all, we are looking at if we can get one physician to make a positive determination we can move forward with that. If they make a negative determination, we will continue to the three until we get a final one. That would substantially increase the resources available to us.

We have asked for more physicians. We have not received fulfillment of our request yet. We are looking at the legislation to see do we need all these certain types of physicians to do this. The legislation also sets salary caps which are fairly unreasonable to ask these physicians to work under. We are also seeing if we can employ these physicians essentially on a full-time basis rather than ad hoc.

We think if we can deal with all of those issues we can get this done. But we will need the help of this committee in addressing some of them.

Senator BUNNING. All right. One other suggestion for the Department to move claims along faster is to group claims together according to where the claimants worked, so that the Department does not have to keep recreating toxic exposure profiles. Why has the Department not grouped claims together so that claims will move faster?

Mr. CARD. We are taking a hard look at that. One of the issues is during the development of our rule a large group of people felt it was very important to have a first in, first out process. The Hays report recommended we revisit that. We are listening to what you want us to do. It is very important because this is an issue of balancing constituent interests. If we make a determination that we misread the constituent interest and they would really rather speed this up by doing the things you are talking about, we are open to revising our process.

Senator BUNNING. Well, we are on a vote now and since I still have some time I am going to—all the people that are on the third panel, please submit all of your testimony for the record because we are going to be at least two votes and then we will come back, unless—go ahead.

Senator MURKOWSKI. Thank you, Mr. Chairman. I appreciate the opportunity to ask a couple more questions here.

I understand that the act allows DOE to enter into agreements with the States whereby DOE will assist workers filing claims under State workers compensation programs. DOE and Alaska have entered into a memorandum of understanding and our MOU provides that DOE may agree to indemnify a DOE contractor or insurer for the State of Alaska workers compensation claims.

My question to you, Mr. Card, is pursuant to this MOU how many DOE contractors, insurers, has DOE agreed to indemnify so that Alaskans with positive physicians panel determinations like Mrs. Carlson can actually receive compensation?

Mr. CARD. For DOE to indemnify a contractor requires that we have a contract, and the problem in Alaska, as I mentioned earlier, is we have been unable to find an active contract with a relevant contractor in Alaska. So while I am not absolutely certain of this, I am pretty sure that the answer will be zero to your question.

Senator MURKOWSKI. So if it is none, if it is zero—and we have also made that assumption, that there are none—what was the purpose of putting this language in the MOU?

Mr. CARD. Well, in the States we have—Assistant Secretary Cook can answer this if she would like, but we attempt to have a fairly standard agreement with the States, so my guess is that was a standard clause. I do not know, Assistant Secretary Cook; do you want to—

Ms. COOK. That was not a clause in the actual MOU. The MOU's specifically state that we will share information with the State worker comp systems. It does not say in that MOU that we will indemnify anyone.

Senator MURKOWSKI. Well, I am looking at the language that was pulled from the MOU and the language as I am reading provides that: "Provided that, consistent with subpart D, such a determination will prevent DOE and may prevent a DOE contractor from contesting an applicant workers compensation claim, and DOE may agree to indemnify a DOE contractor-insurer for State of Alaska workers compensation claims." So perhaps we need to—

Ms. COOK. It says "may" within the legal constraints, and that is what we followed up with. We indemnify our contractors that we have legal arrangements with, but it turns out we do not have a legal arrangement in Alaska.

Senator MURKOWSKI. So you do not have a legal arrangement in Alaska. So again, perhaps we are giving a mixed message to those claimants.

You had indicated, Mr. Card, to Senator Talent you were talking about the willing payor issue and you indicated that at some point in time you would be coming forth with some recommendations. The willing payor issue appears to me to be a huge one, a potential

train wreck. When does DOE plan to provide Congress with recommendations on how best to resolve this?

Mr. CARD. Well, just to correct, I may have said this wrong. Right now DOE is not engaged in evaluating the willing payor issue. I said if somebody wanted to look at it these are the things to have to do. Right now we are focused on getting these claims processed.

Senator MURKOWSKI. Well, how can you get the claims processed with no understanding on the other end as to how you are going to make the payment? Processing the claim just gets Mrs. Carlson through the system, but then she gets to the end, where she has an expectation that, having gone through the system, having had her claim processed, having been determined eligible, she gets nothing.

Why would you suggest that you are not even looking to getting to that step?

Mr. CARD. Well, Senator, a couple things. First of all, as we read the statute Congress expressed its intent of what it wanted in the statute. DOE has not at this time said let us go question that, because we have not engaged in a comprehensive benefits analysis for this workforce. So first of all, we did not read it as our obligation or charter to go look at the willing payor issue.

Secondly, we could be willing to relook at whether we should even process these claims where there does not appear to be—we reviewed our charter again in the statute. We are going to help people no matter what would happen at the end. So but if we would like to at the start make that determination, we would be glad to take a look at that. The problem is that is a State of Alaska issue. The State could change the way it runs its workers compensation program. So we did not want to prejudge what a State may do, since our only job is to assist in configuring this claim for its best possible chance within the State workers compensation system.

So I understand the frustration with the willing payor issue. We really do not view that is in our purview right now.

Senator MURKOWSKI. Mr. Chairman, I might suggest that I do not believe it was Congress's intent that we just run people through a bureaucratic nightmare just so that they can say we processed their claims.

Senator BUNNING. All I can tell you is that I was carrying the water between the House and the Senate when this was being done and it was our intent that each worker have a final determination and be paid. Of course, the Department of Energy has interpreted it slightly different than the Congress intended it. Now we are going to have to either correct it legislatively or we are going to get a new Department of Energy to work with. That is all there is to it.

We have tried to work with the old Department of Energy and got the same run-around that we are getting with the new Department of Energy, and we are not going to tolerate it. I just want the Department to be on notice of that. Getting this thing done was not an easy task, both subtitle B and subtitle D, and there was a commitment of almost \$2.4 billion for the two titles, subtitles, and you are telling me that we are not going to assist anyone after the fact,

after the claim has been filed and after the claim has been approved, and then you are going to drop them off at the non-payor window? I am telling you that is not what the intent of the Congress was.

I am going to kind of calm down and then get some more questions, since they have not started the vote.

Over \$17 million has been spent for SEA, Science and Engineering Associates, to process 109 claims through the physicians panels and to develop 1100 eligible claims to be ready for the physicians panel in 2 years. According to my calculation, this works out to be about \$15,000 per claim. Why has the Department spent so much money on this portion of the program when all SEA appears to be doing is putting case files together for the physician review?

In other words, the person is not getting anything, but people that are working up the claimants seem to be getting more than the claimant is getting at the end.

Mr. CARD. Well, I think the complexity of processing this is certainly a significant concern to me, because this does not look like a great program at this point in terms of the administrative cost versus what the payout may be, although we do not know what that is at this point.

Senator BUNNING. We are not having any problems with the Labor Department payout. I mean, it is pretty clear that they have paid out a lot of claims and it is a lot easier and a lot more simple to determine if someone has passed away and whether they have been eligible for these claims that you now say that there may not be a willing payor for.

Mr. CARD. The benefit at the Department of Labor system again is that they have a smaller, more defined set of causes of diseases that are somewhat easier to qualify and research, and then they get to decide on paying out the benefit. In the case of subtitle D, any toxic substance for any disease that might be caused by it is required to be researched and then it is up to the State workers compensation system.

So that is why you end up with cases like these, because we have to do a lot more research of what was going on at the facility and with the claimant as to their medical history to make those connections in a way that may be convincing for a party that we do not control, the State workers compensation system, to make that decision.

Senator BUNNING. The Department of Energy has processed about 6 compensation of the subtitle D cases and found almost—almost—90 percent of those processed cases to be ineligible. What are the main reasons why employees are being found ineligible for workers compensation benefits?

Ms. COOK. Actually, the amount of ineligibles relate to the total number that have come in. We do handle each case that comes in and do initial screening for eligibility.

Senator BUNNING. Am I wrong in my percentages?

Ms. COOK. Yes, because the—

Senator BUNNING. But GAO says I am right.

Ms. COOK. Well, I understand, but they were not looking at—they did not realize we were looking at all cases that came in. So

the ineligible that we have, which right now is a little over 1,000, are 1,000 out of the 20,000 that have applied are ineligible.

Senator BUNNING. But you have not processed how many of those claims yet?

Ms. COOK. Right now, right now where we are, we have 1,296 that are processed, 317 at physicians panels, and 800 are sitting with workers trying to decide whether they want us to move forward with their cases. So we have got about——

Senator BUNNING. So you are talking about a little over 2,000 total?

Ms. COOK. We have about 12 percent of our cases that we have finished our work and are in various stages.

Senator BUNNING. Am I wrong about the 90 percentile?

Ms. COOK. You said 90 percent of what we had done were ineligible.

Senator BUNNING. Yes.

Ms. COOK. No. 90 percent of the 20,000 are ineligible.

Senator BUNNING. How can you tell that until you process the claim?

Ms. COOK. I am sorry——

Mr. CARD. I think where you are——

Ms. COOK. The ineligible is——

Senator BUNNING. The GAO report is pretty accurate.

Ms. COOK. The ineligible have to do—it is 1,000 out of 20,000 that are ineligible.

Mr. CARD. I think——

Senator BUNNING. The follow-up question—wait a minute, Bob. The follow-up question is how many of the 20,000 claims have you gone through the process of determining whether they are eligible or not eligible?

Ms. COOK. All 20,000.

Senator BUNNING. You have done that? The physicians panel has examined all 20,000 of them?

Ms. COOK. Eligible means they are eligible for our program at all, not did they get a positive finding.

Senator BUNNING. Well then, the process is not finished.

Ms. COOK. I understand.

Mr. CARD. This is correct. The first screening step is——

Senator BUNNING. Well then, your number is completely wrong, if they have not gone through the process.

Ms. COOK. GAO's ineligible, I believe their definition was the same as ours, eligible for the program.

Senator BUNNING. Go ahead, Senator.

Senator MURKOWSKI. Thank you, Mr. Chairman.

This goes back to our discussion about resolving the willing payor issue. I understand that on June 27, 2002 the DOE's Worker Advocacy Committee sent a letter to the Department of Energy with respect to the willing payor problem saying basically, what are you going to do about it. DOE responded on August 9, 2002, stating "The issue of mechanisms of payment of claims where there is no current contractor with responsibility for paying a claim remains a concern. We will continue to explore possible remedies with the WAAC, the general counsel, and Congress to correct this inequity."

This letter was I guess about 15 months ago. I have asked you to give me some indication as to when we might expect something. You have been working on it now for 15 months. Where are we in the process of getting something, some kind of recommendation on willing payor?

If I understand your last response to me, you said: We are not working on it.

Mr. CARD. In response to that letter, we researched this issue and concluded that the statute does not provide for us to find or induce a willing payor. So in terms of that, we feel that issue is closed out. There would be another issue as to whether we undertake some sort of study to evaluate whether there should be or what is the total benefits package that I discussed earlier. We are currently not engaged in such a study, but I think right now our view is the statute as we read it does not empower DOE to go deal with the willing payor issue, other than to look as hard as we can for one, which we are doing. We are not stopping that and, just as we responded to you in Alaska, while we do not see one yet, we have not stopped looking.

Senator MURKOWSKI. You have not stopped looking, but you have got memorandums of understanding that talk about an indemnity, but we cannot do it because we do not have our willing payor. You have the individuals, the claimants, go through a process. You do not tell them that you do not have a willing payor out there.

It seems like what we are doing is we are setting people up here and giving them some hope that you go through this process, you go through the process and at the end there is going to be some resolution. I am not hearing from the way it is set up in DOE that you can provide. You are saying the statute does not allow you to go that far. This is a great concern to me.

Is the DOE defending its physicians panel determinations when they are challenged by insurance companies, and if not why not?

Mr. CARD. I believe—no.

Senator MURKOWSKI. Why not?

Mr. CARD. Again, we view that the statute tells us to provide the support to include in the application for workers compensation, but not beyond that.

Senator MURKOWSKI. So this goes back to your opening statement, when you said we need to communicate what our program is all about; our program is all about assistance. Define for me then what DOE figures your role is in assistance? If you are not helping on the back end in terms of the willing payor issue, you are not defending the physicians panel determinations when they are challenged by an insurance company, what kind of assistance do you provide then?

Mr. CARD. The way I read the statute, there are two core things that seem to be trying to get done. One is to provide this technical medical assistance so that there would be less argument with the State workers compensation system about cause and effect of the disease. That is represented there [indicating]. The other kind is, where legal, to stop the Department or its contractors from opposing such claims. We are vigorously pursuing both of those pathways.

Just let me follow up on your earlier comment. I have taken to heart this communication issue and I will tell you that we are going to take a hard look at what sort of communications we can do up front, because it does seem to be unfair and, while I have not figured out how we would do it because it prejudices a system over which we have no control, we will take an action item to take a look at that.

Senator MURKOWSKI. Go ahead, Mr. Chairman. Thank you.

Senator BUNNING. Thank you.

This will be the last question because we are in the wrap-up, so you can go over and vote if you would like.

Senator MURKOWSKI. We are in a vote?

Senator BUNNING. Senator Frist is wrapping up now.

Last question, and it is similar to Senator Murkowski's. We have found in Paducah that half, 50 percent, of the claims, there is no willing payor on the other end. Even if the claimant is successful in going through all the hoops to get to the end of the line and get a determination, there is no willing payor for 50 percent of the claims.

So you are telling me that you do not think that the Department of Energy has any responsibility after that?

Mr. CARD. It is my opinion the statute does not convey to DOE responsibility for that issue. At Paducah it is not clear whether there is no willing payor or just nobody—

Senator BUNNING. I did not say—in less than 50 percent of the cases.

Mr. CARD. There is a contractor there that we cannot—we do not have the legal authority to direct not to oppose the claims.

Senator BUNNING. And you are not going to pursue any, either through the courts or anything? You are just going to drop it? The claimant will be at the end of the process with no willing payor, so they will be in the same situation as the person in Alaska. There will be no one to pay the bill, even if that person has been determined eligible?

Mr. CARD. If in fact there is no organization with which DOE has a valid contract to become a willing payor and the State system does not provide for it, the answer would be yes.

Senator BUNNING. That is all the questions I have, Mr. Card. I will be seeing some of your people on December 6 in Paducah and we are not finished with this issue, believe me, as we go through the process. Thank you.

If the third panel will be seated, we will be back as quickly as we can after the vote. Thank you.

[Recess from 10:55 a.m. to 11:20 a.m.]

Senator BUNNING. The committee will reconvene and we will hear testimony from the third panel. Mr. Robertson, if you would begin. We are going to make you stick to the 5-minute rule if you do not mind.

STATEMENT OF ROBERT E. ROBERTSON, DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY ISSUES, GENERAL ACCOUNTING OFFICE

Mr. ROBERTSON. Actually, I think in the interest of time I am going to scrap my prepared comments and summarize those summarized comments.

Senator BUNNING. Well, we will accept your full statement for the record.

Mr. ROBERTSON. Very good. Basically what I would like to do is make three points this morning. Having said that, as you alluded to earlier, our testimony today is based on ongoing work of looking at how well DOE has implemented the subtitle D portion of the Energy Employees Occupational Illness Compensation Program Act.

The three points I would like to make this morning are along these lines. The first is to state the obvious—and sometimes that is a good thing to do—that is that DOE has been slow to get a start on processing these claims. Now, very recently we have seen some rather large increases in the speed at which they are developing cases on the front end of the process—they are up to 100 cases per week. I think the question here is whether or not they are going to be able to sustain that speed. That is point number one.

Point number two is, even if they maintain that speed at the front end, we have still got to be concerned about what is happening at the back end, at the physicians panel side of things. That is something that I think this committee and DOE needs to focus attention on. There is only a limited number of qualified, credentialed physicians who can serve on these panels and these panels could become another bottleneck. So that is the second point.

The third point—and we have talked about this, or you have talked about it earlier—concerns the willing payor issue. We have, as is indicated in our testimony, estimated that most of the folks who we have looked at in our sample of DOE facilities will have willing payors.

I would like to say, however, that while there may not be as many people who are in situations where there are not willing payors, I think, as the committee has indicated earlier, we need to focus attention on how to deal with them. But the thing that I would not like to lose sight of is, even when you have the willing payor, situations where you have claimants with willing payors, that does not guarantee that they are going to get paid. So just let us not lose track of that.

The other thing is, again talking about the willing payor situation, we have talked with contractors who basically have said: Yes, we are willing payors, but we need to get some guidance on how to calculate compensation amounts.

So those are the three points I would like to make this morning. I will be happy to answer questions at the appropriate time.

[The prepared statement of Mr. Robertson follows:]

PREPARED STATEMENT OF ROBERT E. ROBERTSON, DIRECTOR, EDUCATION,
WORKFORCE, AND INCOME SECURITY ISSUES, GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss our work regarding the effectiveness of the benefit program under Subtitle D of the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA) in assisting contractor employees in obtaining compensation for occupational illnesses. Congress mandated that we study this issue and report to the Senate Committees on Energy and Natural Resources and Appropriations and the House Committees on Energy and Commerce and Appropriations.

For the last several decades, the Department of Energy (Energy) and its predecessor agencies and contractors have employed thousands of individuals in secret and dangerous work in the nuclear weapons production complex. Over the years, employees were unknowingly exposed to toxic substances, including radioactive and hazardous materials, and studies have shown that many of these employees subsequently developed illnesses. The Energy Employees Occupational Illness Compensation Program provides for compensation to these employees who developed occupational illnesses and, where applicable, to their survivors. Congressional Committees, as well as individual members of Congress, claimants, and advocates have raised concerns regarding Energy's processing of claims and the availability of benefits once claims have been decided.

As title XXXVI of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which was signed into law on October 30, 2000, this legislation has two major components. Subtitle B provides eligible workers who were exposed to radiation or other toxic substances and who subsequently developed illnesses such as cancer and lung disease a one-time payment of up to \$150,000 and covers future medical expenses related to the illness. The Department of Labor administers these benefits, payable from a compensation fund established by the same legislation. Subtitle D allows Energy to help its contractor employees file state workers' compensation claims for illnesses determined by a panel of physicians to be caused by exposure to toxic substances in the course of employment at an Energy facility. The legislation did not set aside funding for payment of benefits under Subtitle D.

My testimony today reflects our ongoing review of the effectiveness of Energy's implementation of Subtitle D. We focused our work on three key areas: (1) the number, status, and characteristics of claims filed with Energy; (2) the extent to which there will be a "willing payor" of workers' compensation benefits; that is, an insurer who—by order from, or agreement with, Energy—will not contest these claims; and (3) the extent to which Energy policies and procedures help employees file timely claims for state workers' compensation benefits.

In summary, as of June 30, 2003, Energy had fully processed about 6 percent of the nearly 19,000 cases received, and more than three-quarters of all cases were associated with facilities in nine states. Energy had not begun processing over half of the cases received. While some other case characteristics can be determined, such as illness claimed, systems limitations prevent reporting on other case characteristics, such as the reasons for ineligibility or basic demographics.

While the majority of cases (86 percent) associated with major Energy facilities in nine states potentially have a willing payor of workers' compensation benefits, actual compensation is not certain. In certain states such as Ohio and Iowa, there are likely to be many cases that lack willing payors, and in some instances may be less likely to receive compensation than a comparable case with a willing payor in a different state. The 86 percent figure reflects the number of cases for which contractors and their insurers are likely to not contest a workers' compensation claim, rather than the number of cases that will ultimately be paid.

For all claimants, actual compensation is not certain because of additional factors such as variations in state workers' compensation programs or contractors' uncertainty on how to compute the benefit. Claims for workers' compensation have been delayed by two bottlenecks in Energy's claims process. First, Energy's case development process has not always produced sufficient cases to keep physician panel: operating at full capacity. While additional resources may allow Energy to move a sufficient number of cases through its case development process, the physician panel process will continue to be a second and more important bottleneck.

The number of panels, constrained by the scarcity of physicians qualified to serve on panels, will limit Energy's capacity to decide cases more quickly, using its current procedures. Energy officials are exploring ways that the panel process could be made more efficient.

To perform our review, we analyzed data extracted from Energy's Subtitle D case management system for applications filed through June 30, 2003.¹

We also reviewed the provisions of, and interviewed officials with, the workers' compensation programs in nine states accounting for more than three-quarters of Subtitle D cases filed, and we interviewed the contractors operating the major facilities in these states. In addition, we conducted site visits to three Energy facilities in Oak Ridge, Tennessee, the state with facilities accounting for the largest number of Subtitle D claims. We also interviewed key program officials and other experts. We conducted our review from April 2003 through October 2003 in accordance with generally accepted government auditing standards.

BACKGROUND

Energy oversees a nationwide network of 40 contractor-operated industrial sites and research laboratories that have historically employed more than 600,000 workers in the production and testing of nuclear weapons. In implementing EEOICPA, the President acknowledged that it had been Energy's past policy to encourage and assist its contractors in opposing workers' claims for state workers' compensation benefits based on illnesses said to be caused by exposure to toxic substances at Energy facilities.² Under the new law, workers or their survivors could apply for assistance from Energy in pursuing state workers' compensation benefits, and if they received a positive determination from Energy, the agency would direct its contractors to not contest the workers' compensation claims or awards. Energy's rules to implement the new program became effective in September 2002, and the agency began to process the applications it had been accepting since July 2001, when the law took effect.

Energy's claims process has several steps, as shown in figure 1.* First, claimants file applications and provide all available medical evidence. Energy then develops the claims by requesting records of employment, medical treatment, and exposure to toxic substances from the Energy facilities at which the workers were employed. If Energy determines that the worker was not employed by one of its facilities or did not have an illness that could be caused by exposure to toxic substances, the agency finds the claimant ineligible. For all others, once development is complete a panel of three physicians reviews the case and decides whether exposure to a toxic substance during employment at an Energy facility was at least as likely as not to have caused, contributed to, or aggravated the claimed medical condition. The panel physicians are appointed by the National Institute for Occupational Safety and Health (NIOSH) but paid by Energy for this work. Claimants receiving positive determinations are advised that they may wish to file claims for state workers' compensation benefits. Claimants found ineligible or receiving negative determinations may appeal to Energy's Office of Hearings and Appeals.

Each of the 50 states and the District of Columbia has its own workers' compensation program to provide benefits to workers who are injured on the job or contract a work-related illness. Benefits include medical treatment and cash payments that partially replace lost wages. Collectively, these state programs paid more than \$46 billion in cash and medical benefits in 2001. In general, employers finance workers' compensation programs. Depending on state law, employers finance these programs through one of three methods: (1) they pay insurance premiums to a private insurance carrier; (2) they contribute to a state workers' compensation fund; or (3) they set funds aside for this purpose as self-insurance. Although state workers' compensation laws were enacted in part as an attempt to avoid litigation over workplace accidents, the workers' compensation process is still generally adversarial, with employers and their insurers tending to challenge aspects of claims that they consider not valid.

State workers' compensation programs vary as to the level of benefits, length of payments, and time limits for filing. For example, in 1999, the maximum weekly benefit for a total disability in New Mexico was less than \$400, while in Iowa it was approximately \$950. In addition, in Idaho, the weekly benefit for total disability would be reduced after 52 weeks, while in Iowa benefits would continue at the original rate for the duration of the disability. Further, in Tennessee, a claim must be filed within 1 year of the beginning of incapacity or death. However, in Kentucky

¹We collected data as of this date to enable us to assess the reliability of Energy's data by: (1) performing electronic testing for obvious errors in accuracy and completeness; (2) reviewing available documentation; and (3) interviewing agency officials and contractors knowledgeable about the data. We determined that the data elements used were sufficiently reliable for our purposes.

²Executive Order 13179 of December 7, 2000.

*All figures have been retained in committee files.

a claim must be filed within 3 years of exposure to most substances, but within 20 years of exposure to radiation or asbestos.

ENERGY HAS FULLY PROCESSED FEW CASES, AND SYSTEMS LIMITATIONS COMPLICATE PROGRAM MANAGEMENT

As of June 30, 2003, Energy had completely processed about 6 percent of the nearly 19,000 cases that had been filed, and the majority of all cases filed were associated with facilities in nine states. Forty percent of cases were in processing, but more than 50 percent remained unprocessed. While some case characteristics can be determined, such as illness claimed, systems limitations prevent reporting on other case characteristics, such as the reasons for ineligibility or basic demographics.

About 6 Percent of Cases Have Been Fully Processed

During the first 2 years of the program, ending June 30, 2003, Energy had fully processed about 6 percent of the nearly 19,000 claims it received. The majority of these claims had been found ineligible because of either a lack of employment at an eligible facility or an illness related to toxic exposure. Of the cases that had been fully processed, 42 cases—less than one-third of 1 percent of the nearly 19,000 cases filed—had a final determination from a physician panel. More than two-thirds of these determinations (30 cases) were positive. At the time of our study, Energy had not yet begun processing more than half of the cases, and an additional 40 percent of cases were in processing (see fig. 2). The majority of cases being processed were in the case development stage, where Energy requests information from the facility at which the claimant was employed. Less than 1 percent of cases in process were ready for physician panel review, and an additional 1 percent were undergoing panel review.

A majority of cases were filed early during program implementation, but new cases continue to be filed. Nearly two-thirds of cases were filed within the first year of the program, between July 2001 and June 2002. However, in the second year of the program—between July 2002 and June 30, 2003—Energy continued to receive more than 500 cases per month. Energy officials report that they currently receive approximately 100 new cases per week.

While cases filed are associated with facilities in 38 states or territories, the majority of cases are associated with Energy facilities in nine states (see fig. 3).³ Facilities in Colorado, Idaho, Iowa, Kentucky, New Mexico, Ohio, South Carolina, Tennessee, and Washington account for more than 75 percent of cases received by June 30, 2003. The largest group of cases associated with facilities in Tennessee.

Workers filed the majority of cases, and cancer is the most frequently reported illness. Workers filed about 60 percent of cases, and survivors of deceased workers filed about 36 percent of cases. In about 1 percent of cases, a worker filed a claim that was subsequently taken up by a survivor. Cancer is the illness reported in more than half of the cases. Diseases affecting the lungs accounted for an additional 14 percent of cases. Specifically, chronic beryllium disease is reported in 1 percent of cases, and beryllium sensitivity, which may develop into chronic beryllium disease, is reported in an additional 5 percent. About 7 percent of cases reported asbestosis, and less than 1 percent claimed silicosis.

Systems Limitations Complicate Program Management

Systems limitations prevent Energy officials from aggregating certain information important for program management. For example, the case management system does not collect information on the reasons that claimants had been declared ineligible or whether claimants have appealed decisions. Systematic tracking of the reasons for ineligibility would make it possible to identify other cases affected by appeal decisions that result in policy changes. While Energy officials report that during the major systems changes that occurred in July 2003, fields were added to the system to track appeals information, no information is yet available regarding ineligibility decisions. In addition, basic demographic data such as age and gender of claimants are not available. Gender information was not collected for the majority of cases. Further, insufficient edit controls—for example, error checking that would prevent claimants' dates of birth from being entered if the date was in the future—prevent accurate reporting on claimants' ages.

Insufficient strategic planning regarding data collection and tracking have made it difficult for Energy officials to completely track case progress and determine whether they are meeting the goals they have established for case processing. For

³ See Energy's Web site at: <http://tis.eh.doe.gov/advocacy/index.html> for more information on the current distribution of cases across facilities and states.

example, Energy established a goal of completing case development within 120 days of case assignment to a case manager. However, the data system developed by contractors to aid in case management was developed without detailed specifications from Energy and did not originally collect sufficient information to track Energy's progress in meeting this 120-day goal. Furthermore, status tracking has been complicated by changes to the system and failure to consistently update status as cases progress. While Energy reports that changes made as of July 2003 should allow for improved tracking of case status, it is unclear whether these changes will be applied retroactively to status data already in the system. If they are not, Energy will still lack complete data regarding case-processing milestones achieved prior to these changes.

WHILE A MAJORITY OF CASES POTENTIALLY HAVE A WILLING PAYER, ACTUAL
COMPENSATION IS NOT CERTAIN

Our analysis shows that a majority of cases associated with major Energy facilities in nine states⁴ will potentially have a willing payor of workers' compensation benefits. This finding reflects the number of cases for which contractors and their insurers are likely to not contest a workers' compensation claim, rather than the number of cases that will ultimately be paid. The contractors considered to be willing payors are those that have an order from, or agreement with, Energy to not contest claims. However, there are likely to be many claimants who will not have a willing payor in certain states, such as Ohio and Iowa. For all claimants, additional factors such as state workers' compensation provisions or contractors' uncertainty on how to compute the benefit may affect whether or how much compensation is paid.

A Majority of Cases in Nine States Will Potentially Have a Willing Payer

A majority of cases in nine states will potentially have a willing payor of workers' compensation benefits, assuming that for all cases there has been a positive physician panel determination and the claimant can demonstrate a loss from the worker's illness that has not previously been compensated. Specifically, based on our analysis of workers' compensation programs and the different types of workers' compensation coverage used by the major contractors, it appears that approximately 86 percent of these cases will potentially have a willing payor—that is, contractors and their insurers who will not contest the claims for benefits. It was necessary to assume that all cases filed would receive a positive determination by a physician panel because sufficient data are not available to project the outcomes of the physician panel process.

More specifically, there are indications that the few cases that have received determinations from physician panels may not be representative of all cases filed, and sufficient details on workers' medical conditions were not available to enable us to independently judge the potential outcomes. In addition, we assumed that all workers experienced a loss that was not previously compensated because sufficient data were not available to enable us to make more detailed projections on this issue.

As shown in table 1, most of the contractors for the major facilities in these states are self-insured, which enables Energy to direct them to not contest claims that receive a positive medical determination.⁵ In addition, the contractor in Colorado, which is not self-insured but has a commercial policy, took the initiative to enter into an agreement with Energy to not contest claims. The contractor viewed this action as being in its best interest to help the program run smoothly. However, it is unclear whether the arrangement will be effective because no cases in Colorado have yet received compensation. In such situations where there is a willing payor, the contractor's action to pay the compensation consistent with Energy's order to not contest a claim will override state workers' compensation provisions that might otherwise result in denial of a claim, such as failure to file a claim within a specified period of time. However, since no claimants to date have received compensation as a result of their cases filed with Energy, there is no actual experience about how contractors and state workers' compensation programs treat such cases.

⁴The cases in these nine states represent more than three-quarters of the cases filed nationwide. The results of our analysis cannot necessarily be applied to the remaining 25 percent of the cases filed nationwide.

⁵EEOICPA allows Energy, to the extent permitted by law, to direct its contractors not to contest such workers' compensation claims. In addition, Energy's regulations prohibit the inclusion of the costs of contesting such claims as allowable costs under its contracts with the contractors; however, the costs incurred as the result of a workers' compensation award are allowed as reimbursable costs to the full extent permitted under the contracts.

About 14 percent of cases in the nine states we analyzed may not have a willing payor. Therefore, in some instances these cases may be less likely to receive compensation than a comparable case for which there is a willing payor, unless the claimant is able to overcome challenges to the claim. Specifically, these cases that lack willing payors involve contractors that (1) have a commercial insurance policy; (2) use a state fund to pay workers' compensation claims; or (3) do not have a current contract with Energy. In each of these situations, Energy maintains that it lacks the authority to make or enforce an order to not contest claims. For instance, an Ohio Bureau of Workers' Compensation official said that the state would not automatically approve a case, but would evaluate each workers compensation case carefully to ensure that it was valid and thereby protect its state fund.

Table 1: EXTENT TO WHICH CASES IN NINE STATES WILL POTENTIALLY HAVE WILLING PAYERS

Types of workers' compensation coverage	Energy facility, State	Number of case as reported in Energy data
Cases that will potentially have a willing payor		
Self-insurance	Idaho National Engineering Lab, Idaho Paducah Gaseous Diffusion Plant, Kentucky Los Alamos National Lab, New Mexico Savannah River Site, South Carolina Oak Ridge K-25, X-10, and Y-12 Plants, Tennessee Hanford Site, Washington	724 978 1,043 2,873 1,664
Commercial policy, agreement with Energy not to contest claims	Rocky Flats Plant, Colorado	1,488
Subtotal of cases with a willing payor		86%, or 12,095
Cases That May Not Have a Willing Payer		
Commercial policy, no agreement with Energy to not contest claims; leases Energy facility	Paducah Gaseous Diffusion Plant, Kentucky	977
State fund	Portsmouth Gaseous Diffusion Plant, Ohio	506
No current contractor	Iowa Ordnance Plant, Iowa	563
Subtotal of cases without a willing payor		14%, or 2,046

Source: GAO analysis of Energy data and interviews with current contractors.

Note: The table includes the cases from the facilities in these states with the largest number of case filed but does not include the remaining 721 cases (5 percent) from other facilities in these states.

While an Energy contractor previously operated the Paducah Gaseous Diffusion Plant, the plant is currently operated by a private entity that leases the facility. In addition, an Energy contractor is currently performing environmental cleanup at the facility. We split the cases filed for the Paducah facility evenly between the current operator and the cleanup contractor, based on discussions with the cleanup contractor.

Concerns about the extent to which there will be willing payors of benefits have led to various proposals for addressing this issue. For example, the state of Ohio proposed that Energy designate the state as a contractor to provide a mechanism for reimbursing the state for paying the workers' compensation claims. However, Energy rejected this proposal on the ground that EEOICPA does not authorize the agency to establish such an arrangement. In a more wide-ranging proposal, legislation introduced in this Congress⁶ proposes to establish Subtitle D as a federal program with uniform benefits administered by the Department of Labor.

Multiple Factors Make Compensation Not Certain

In contrast to Subtitle B provisions that provide for a uniform federal benefit that is not affected by the degree of disability, various factors may affect whether a Subtitle D claimant is paid under the state workers' compensation program or how much compensation will be paid. Beyond the differences in the state programs that may result in varying amounts and length of payments, these factors include the demonstration of a loss resulting from the illness and contractors' uncertainty on how to compute compensation.

Even with a positive determination from a physician panel and a willing payor, claimants who cannot demonstrate a loss, such as loss of wages or medical expenses, may not qualify for compensation. On the other hand, claimants with positive determinations but not a willing payor may still qualify for compensation under the state program if they show a loss and can overcome all challenges to the claim raised by the employer or the insurer.

Contractors' uncertainty on how to compute compensation may also cause variation in whether or how much a claimant will receive in compensation. While contractors with self-insurance told us that they plan to comply with Energy's directives to not contest cases with positive determinations, some contractors were unclear about how to actually determine the amount of compensation that a claimant will receive. For example, one contractor raised a concern that no guidance exists to inform contractors about whether they can negotiate the degree of disability, a factor that could affect the amount of the workers' compensation benefit. Other contractors will likely experience similar situations, as Energy has not issued guidance on how to consistently compute compensation amounts.

While not directly affecting compensation amounts, a related issue involves how contractors will be reimbursed for claims they pay. Energy uses several different types of contracts to carry out its mission, such as operations or cleanup, and these different types of contracts affect how workers' compensation claims will be paid. For example, a contractor responsible for managing and operating an Energy facility was told to pay the workers' compensation claims from its operating budget. The contractor said that this procedure may compromise its ability to conduct its primary responsibilities. On the other hand, a contractor cleaning up an Energy facility was told by Energy officials that its workers' compensation claims would be reimbursed under its contract, and therefore paying claims would not affect its ability to perform cleanup of the site.

BOTTLENECKS IN ENERGY'S CLAIMS PROCESS DELAY FILING OF WORKERS' COMPENSATION CLAIMS

As a result of Energy's policies and procedures for processing claims, claimants have experienced lengthy delays in receiving the determinations they need to file workers' compensation claims. In particular, the number of cases developed during initial case processing has not always been sufficient to allow the physician panels to operate at full capacity. Moreover, even if these panels were operating at full capacity, the small pool of physicians qualified to serve on the panels would limit the agency's ability to produce more timely determinations. Energy has recently allocated more funds for staffing for case processing, but it is still exploring methods for improving the efficiency of its physician panel process.

Sufficient Cases Have Not Always Been Available for Physician Panel Review

Energy's case development process has not consistently produced enough cases to ensure that the physician panels are functioning at full capacity. To make efficient use of physician panel resources, it is important to ensure that a sufficient supply of cases is ready for physician panel review. Energy officials established a goal of completing the development on 100 cases per week by August 2003 to keep the panels fully engaged.

However, as of September 2003, Energy officials stated that the agency was completing development of only about 40 cases a week. Further, while agency officials

⁶H.R. 1758, sponsored by Representative Ted Strickland, was introduced on April 10, 2003.

indicated that they typically assigned 3 cases at a time to be reviewed within 30 days, several panel physicians indicated that they received fewer cases, some receiving a total of only 7 or 8 during their first year as a panelist.

Energy was slow to implement its case development operation. Initially, agency officials did not have a plan to hire a specific number of employees for case development, but they expected to hire additional staff as they were needed. When Energy first began developing cases, in the fall of 2002, the case development process had a staff of about 14 case managers and assistants. With modest staffing increases, the program quickly outgrew the office space used for this function.

Though Energy officials acknowledged the need for more personnel by spring 2003, they delayed hiring until additional space could be secured, in August. As of August 2003, Energy had more than tripled the number of employees dedicated to case development to about 50, and Energy officials believe that they will now be able to achieve their goal of completing development of 100 cases a week that will be ready for physician panel review.

Energy officials cited a substantial increase in the number of cases ready for physician panel review during October 2003, and reported preparing more than a hundred cases for panel review in the first week of November 2003.

Energy shifted nearly \$10 million from other Energy accounts into this program in fiscal year 2003, and plans to shift an additional \$33 million into the program in fiscal year 2004, to quadruple its case-processing operation. With additional resources, Energy plans to complete the development of all pending cases as quickly as possible and have them ready for the physician panels. However, this would create a large backlog of cases awaiting review by physician panels. Because most claims filed so far are from workers whose medical conditions are likely to change over time, creation of such a backlog could further slow the decision process by making it necessary to update medical records before panel review.

The Ability to Produce More Timely Decisions May Be Limited by the Small Pool of Qualified Physicians and Gaps in Information They Need to Quickly Decide Cases

Even if additional resources allow Energy to speed initial case development, the limited pool of qualified physicians⁷ for panels will likely prevent significant improvements in processing time. Currently, approximately 100 physicians are assigned to panels of 3 physicians. In an effort to improve overall processing time, Energy has requested that NIOSH appoint an additional 500 physicians to staff the panels. NIOSH has indicated that the pool of physicians with the appropriate credentials and experience (including those already appointed) may be limited to about 200.

Even if Energy were able to increase the number of panel physicians to 200, with each panel reviewing 3 cases a month, the panels would not be able to review more than 200 cases in any 30-day period, given current procedures. Thus, even with double the number of physicians currently serving on panels, it could take more than 7 years to process all cases pending as of June 30, 2003, without consideration of the hundreds of new cases the agency is receiving each month.⁸

Energy officials are exploring ways that the panel process could be made more efficient. For example, the agency is currently planning to establish permanent physician panels in Washington, DC. Physicians who are willing to serve full-time for a 2- or 3-week period would staff these panels. In addition, the agency is considering reducing the number of physicians serving on each panel—for example, initially using one physician to review a case, assigning a second physician only if the first reaches a negative determination, and assigning a third physician if needed to break a tie. Energy staff are currently evaluating whether such a change would require a change in their regulations.

Agency officials have also recommended additional sources from which NIOSH might recruit qualified physicians and are exploring other potential sources. For example, the physicians in the military services might be used on a part-time basis. In addition, physicians from the Public Health Service serve on temporary full-time details as panel physicians.

Panel physicians have also suggested methods to Energy for improving the efficiency of the panels. For example, some physicians have stated that more complete

⁷The criteria NIOSH uses to evaluate qualifications for appointing physicians to these panels include: (1) board certification in a primary discipline; (2) knowledge of occupational medicine; (3) minimum of 5 years of relevant clinical practice following residency; and (4) reputation for good medical judgment, impartiality, and efficiency.

⁸This 7-year estimate assumes that none of the pending cases would be determined ineligible on the basis of non-covered employment or illnesses because we did not possess a sufficient basis for projecting the number of additional cases that would be determined ineligible in the future.

profiles of the types and locations of specific toxic substances at each facility would speed their ability to decide cases. In addition, one panel physician told us that one of the cases he reviewed received a negative determination because specific documentation of toxic substances at the worker's location was lacking. While Energy officials reported that they have completed facility overviews for about half the major sites, specific data are available for only a few sites. Agency officials said that the scarcity of records related to toxic substances and a lack of sufficient resources constrain their ability to pursue building-by building profiles for each facility.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other members of the Committee may have at this time.

Senator BUNNING. Dr. Burton.

**STATEMENT OF JOHN F. BURTON, JR., Ph.D., PROFESSOR,
RUTGERS UNIVERSITY**

Dr. BURTON. Senator Bunning, thank you. My name is John Burton and I am here on my own behest, I guess, at the request of the committee. I served as a member of the Workers Advocacy Advisory Committee for the Department of Energy in 2001 and 2002. I previously served as the chairman of the National Commission on State Workman's Compensation Laws, which submitted its report in 1972.

My views on the proper method to compensate workers who participated in the nuclear weapons program have evolved. My starting point reflected the attitude of the National Commission, which supported Federal standards for State workers compensation programs but opposed federalization of those State programs. My preference for State-administered programs led me to support the initial concept of subtitle D of the act, which essentially relied on State workers compensation programs to deliver benefits to workers from the nuclear weapons industry.

Many of these workers did not qualify for workers compensation benefits under the compensability rules included in most State workers compensation programs. Nonetheless, I assumed that those parties interested in State workers compensation programs would welcome the opportunity to rectify the deficiencies of these State programs because of the compelling case presented by disabled workers or their survivors in the industry and because of the interest of the parties in workers compensation to demonstrate that the State programs could adapt to the demonstrated deficiencies.

My views have changed over the 3 years since the act was enacted about the desirability and the feasibility of the approach used in subtitle D. There are several reasons why my views have changed. First, my conversations and meetings with State workers compensation administrators indicated that many of them did not view the act as an effort to preserve essential elements of State workers compensation programs, but rather as a Federal program incompatible with the purposes of the State programs. These administrators essentially say they would prefer a pure Federal program that does not force them to bend the normal compensability rules in their State programs.

Second, some States have gone beyond the mere expression of uneasiness with the prospects of bending the spirit of the act, namely to reach out to workers who historically did not meet the compensability test for workers compensation benefits, they have

gone beyond uneasiness to establishing a hostile environment for workers with subtitle D claims.

A third reason why I have serious doubts about the subtitle D approach is that even in States where the workers compensation agency is sympathetic to the spirit of the act and is willing to stretch the legal rules as far as possible, there are serious legal problems in processing claims. For example, even if a claim is accepted, how is the extent of disability to be determined.

If, for example, a worker has a condition that the employer concedes is compensable and the worker asserts she is 80 percent disabled, but the employer feels she is only 30 percent disabled, can the employer present evidence to support the employer's view? If so, will the Department of Energy reimburse the employer for the expenses associated with presenting this evidence?

A fourth reason why the subtitle D approach is questionable is that there apparently are a significant number of workers for whom there is no willing payor. We have heard testimony on that certainly this morning. At a minimum, there appear to be 15 percent of workers who would qualify for benefits but for whom there are no contractors or insurers who can be ordered or even encouraged to pay benefits.

These reasons have persuaded me that the current approach to compensating workers from the nuclear weapons industry contained in subtitle D is fatally flawed. I reluctantly concluded that the approach that attempts to blend Federal and State procedures and criteria for benefits will not work. My suggestion is that subtitle D be abandoned in favor of a Federal program of benefits for disabled workers or their survivors in the nuclear weapons industry who can establish that their medical conditions are a result of occupational conditions or exposures in the industry.

I will not try to specify the details of such a program here. The compensability rules being used by the physicians panels should be the starting point for determining eligibility. The starting point for benefits should be the Model Workers Compensation Act which was published by the Council of State Governments in the 1970's.

The current issue about whether the administration of subtitle D benefits should be transferred from the Department of Energy to the Department of Labor is in my view of secondary importance to establishing a viable program of benefits for those workers covered by subtitle D. The Department of Labor appears to be doing a commendable job of administering the subtitle B benefits, especially those included in the special exposure cohort.

However, if the current subtitle D claims were transferred to the Department of Labor without changes in the basic design of the program, the Department of Labor would face most of the fundamental reasons specified above why the subtitle D claims are not viable, such as the problems of recalcitrant, if not hostile, State workers compensation agencies and the lack of willing payors. These problems are not going to disappear by moving the files from Independence Avenue to Constitution Avenue.

[The prepared statement of Dr. Burton follows:]

PREPARED STATEMENT OF JOHN F. BURTON, JR., PH.D., PROFESSOR,
RUTGERS UNIVERSITY

Mr. Chairman and members of the committee: My name is John Burton. I am appearing at the request of the Committee on Energy and Natural Resources. I am a Professor in the School of Management and Labor Relations at Rutgers: The State University of New Jersey. I am currently the Chair of the Steering Committee on Workers' Compensation of the National Academy of Social Insurance and a member of the Advisory Council on Workers' Compensation for the Commissioner of the New Jersey Department of Labor. I am, however, submitting this statement on my own and not as a representative of these organizations.

I served as a member of the Workers Advocacy Advisory Committee (WAAC) for the Department of Energy in 2001-02. I previously served as the Chairman of the National Commission on State Workmen's Compensation Laws, which submitted its report to the President and the Congress in 1972.

I am attaching a statement submitted to a Hearing on Proposed Physician Panel Rules held by the Department of Energy on October 10, 2001.* Subsequent to that hearing, I attended various meetings of the WAAC, and I chaired a meeting of the Contractors and Insurers Cooperation Subcommittee of the Workers Advocacy Advisory Committee in December 2002. Since the demise of the WAAC at the end of 2002, I have been much less involved in monitoring developments under the EEPOCA, although I have read a number of reports, news articles, editorials, and documents concerning recent developments under the program.

My views on the proper method to compensate workers who participated in the nuclear weapons program have evolved. My starting point reflected the attitude of the National Commission on State Workmen's Compensation Laws, which supported federal standards for state workers' compensation programs, but opposed federalization of the state programs. I use the term "federalization" to mean a uniform set of standards established by the Federal government and operation of the program by federal employees. My aversion to federalization was based in part on my perception that historically federal workers' compensation programs, notably the Federal Employees Compensation Act (FECA), were not particularly well designed or administered.

My preference for state-administered programs led to me support the initial concept of Subtitle D of the EEOICPA, which essentially relied on state workers' compensation programs to deliver benefits to workers from the nuclear weapons industry. Many of these workers did not qualify for workers' compensation benefits under the compensability rules included in most state workers' compensation programs. Nonetheless, I assumed that those parties interested in state workers' compensation programs, including state administrators, private insurance carriers, and employers, would welcome the opportunity to rectify the deficiencies of the state programs because of the compelling case presented by disabled workers or their survivors in this industry and because of the interest of the parties in workers' compensation to demonstrate that the state programs could adapt to the demonstrated deficiencies.

My views have changed over the three years since the EEOICPA was enacted about the desirability and feasibility of the approach used in Subtitle D, which largely relies on state workers' compensation programs to provide benefits to deserving workers and their families. There are several reasons why my views have changed. First, my conversations and meetings with state workers' compensation administrators indicated that many of them did not view the EEOICPA as an effort to preserve essential elements of state workers' compensation programs, but rather as a federal program incompatible with the purposes of the state programs. These administrators essentially said they would prefer a pure federal program that does not force them to bend the normal compensability rules in their state programs. Second, some states have gone beyond the mere expression of uneasiness with the prospects of blending the spirit of the EEOICPA (namely to reach out to workers who historically did not meet the compensability tests for workers' compensation benefits) to establishing a hostile environment for workers with Subtitle D claims.

A third reason why I have serious doubts about the Subtitle D approach is that even in states where the workers' compensation agency is sympathetic to the spirit of the EEOICPA and is willing to stretch the legal rules as far as possible, there are still serious legal problems in processing claims. For example, even if a claim is accepted, how is the extent of disability to be determined? A contractor may follow DOE directives and not contest the compensability of the claim, but the most vexing issue in many workers' compensation cases is the extent of disability. The most expensive and controversial type of workers' compensation claim is one in

*The attachment has been retained in committee files.

which the worker is permanently and partially disabled. If the worker has a condition that the employer concedes is compensable, and the worker asserts she is 80 disabled but the employer feels she is only 30 disabled, can the employer present evidence to support the employer's view? If so, will the DOE reimburse the employer for the expenses associated with presenting this evidence?

A fourth reason why the Subtitle D approach is questionable is that there apparently are a significant number of workers for whom there is no willing payor. At a minimum, there appear to be 15 percent of workers who would qualify for benefits but for whom there are no contractors or insurers who can be ordered or even encouraged to pay benefits. (The failure to have a better estimate of the magnitude of this problem is frustrating, because the WAAC encouraged the Department of Energy to devote resources to clarifying this issue on several occasions with little success. For example, we suggested that a random sample of several hundred cases be drawn from all the applicants and the payor status of these cases be examined. To the best of my knowledge, the DOE has never implemented this suggestion.)

These reasons have persuaded me that the current approach to compensating workers from the nuclear weapons industry contained in Subtitle D is fatally flawed. I have reluctantly concluded the approach that attempts to blend federal and state procedures and criteria for benefits will not work. (I want to make clear that I still support federal standards for state workers' compensation programs of the type recommended by the National Commission on State Workmen's Compensation Laws.)

My suggestion is that Subtitle D be abandoned in favor of a federal program of benefits for disabled workers (or their survivors) in the nuclear weapons industry who can establish that their medical conditions are a result of occupational conditions or exposures. I will not try to specify the details of such a program here. The compensability rules being used by the physicians' panels should be the starting point for determining eligibility. The starting point for benefits should be the *Model Workers' Compensation Act (Revised)*, which was published by the Council of State Government in the 1970s. (The Federal Employees Compensation Act is not an appropriate starting point.)

The current issue about whether the administration of Subtitle D benefits should be transferred from the Department of Energy to the Department of Labor is, in my view, of secondary importance to establishing a viable program of benefits for those workers covered by Subtitle D. The Department of Labor appears to be doing a commendable job of administering the Subtitle B benefits, especially those included in the special exposure cohort (SEC). However, for those claimants under Subtitle B for whom the Department of Labor relies on NIOSH to construct individual dose reconstruction or to designate additional members of the SEC, the Department of Labor has processed only a small percentage of claims, which suggests there is no inherent advantage to having the Department of Labor responsible for administering claims. Moreover, if the current Subtitle D claims were transferred to the Department of Labor without changes in the basic design of the program, the Department would face most of the fundamental reasons specified above why the Subtitle D claims are not viable, such as the problems of recalcitrant if not hostile state workers' compensation agencies and the lack of willing payors. These problems are not going to disappear by moving the files from Independence Avenue to Constitution Avenue.

Senator BUNNING. You are the first person what ever did it exactly in 5 minutes. Congratulations.

Mr. Leon Owens.

Dr. BURTON. There must be a Nobel Prize or something.

Senator BUNNING. Something, something special.

**STATEMENT OF LEON OWENS, PRESIDENT, PACE LOCAL 5-550,
PADUCAH, KY**

Mr. OWENS. Good morning, Senator Bunning.

Senator BUNNING. Good morning.

Mr. OWENS. My name is Leon Owens. I am employed as a production cascade operator at the Paducah Gaseous Diffusion Plant in Paducah, Kentucky. Before the privatization of the United States Enrichment Corporation, I was employed by DOE contractors. I serve as the president of PACE Local 5-550 in Paducah,

which represents 750 hourly maintenance, production, and environmental cleanup workers at the site. I also serve on the Federal Advisory Board on Radiation and Worker Health, which by law is required to advise and audit the NIOSH radiation dose reconstruction process. However, I am here in my capacity as president of the local union which represents workers at Paducah.

Until the *Washington Post* article appeared on August 8, 1999, most Paducah workers, including myself, did not realize they were potentially exposed to toxic substances, such as plutonium, neptunium, and technetium compounds. Senate Energy Committee field hearings held by you and subsequent investments by the Department of Energy confirmed that workers were exposed for decades to these extremely radiotoxic elements, up to 2,000 times the maximum threshold levels. Furthermore, adequate respiratory protection and radiation monitoring were not provided for over 40 years.

A March 11, 1960, memorandum from the Director of the Atomic Energy Commission's Division of Biology and Medicine states: "There are possibly 300 people at Paducah who should be checked out for neptunium exposure, but they hesitate to proceed to the intensive studies because of the union's use of this as an excuse for hazard pay."

The memo further stated to "get post-mortem samples on any of these potentially contaminated men for correlation of tissue content with urine output, but I am afraid the policy at this plant is to be wary of the unions and any unfavorable public relations."

In 1999, the Department of Energy medical screening program was initiated at Paducah. Approximately 1900 workers have been screened and physicians have diagnosed lung diseases for which there is an occupational contribution in 24 percent of the workers they have examined. In addition, 42 individuals have had at least one positive blood test for beryllium sensitivity.

2,215 subtitle D claims have been filed in Paducah and to my knowledge only one claim has been moved through the physicians panel and not a single claim has been paid. Even if a valid claim had been approved through the physicians panel, it is unclear whether there will be a willing payor because DOE cannot direct USEC to abide by physicians panel determinations and private insurers on any of the claims from the Union Carbide era. The memorandum of agreement that DOE entered into with the State of Kentucky makes it plain that DOE cannot direct the State of private insurance companies to honor DOE's physicians panel findings.

Mr. Chairman, when this historic piece of legislation was enacted Congress knew that subsequent enabling legislation was needed. That is why it directed the administration to submit subsequent enabling legislation no later than March 15, 2001, and it further directed the General Accounting Office to evaluate the effectiveness of DOE's implementation of subtitle D no later than February 1, 2002.

The DOE lacks the capacity to effectively administer claims processing responsibilities. Furthermore, its performance and broken commitments justify a change. The union supported the Grassley-Murkowski amendment as well as the Energy Workers Compensation Act which was filed in the 107th Congress by Senator Binga-

man and Senator Bunning. These legislative vehicles would rectify the existing problems with subtitle D by transferring the administration of subtitle D claims to the Department of Labor and provide for a willing payor for all valid claims.

The DOL has swiftly implemented a well-run program in administering subtitle B claims and the DOL has not only the expertise and infrastructure to correct DOE's flawed program, but also the excess capacity to process more claims because it has worked off most of its backlog.

Mr. Chairman, we understand that DOE has received recommendations from the Hays Company, a consultant it brought in to tell its contractor how to do better. The recommendations call for shifting the burden back to the employee when there is little or no known medical causation. Using this new standard, DOE could clear out its backlog of claims in a matter of months. This recommendation prejudices cases even before they arrive at the physicians panel.

We urge legislative reforms because time is running out for many of these sick workers, who performed an essential function and mission for the U.S. Government and have been put at needless risk and harmed by DOE and its contractors.

Thank you very much.

[The prepared statement of Mr. Owens follows:]

PREPARED STATEMENT OF LEON OWENS, PRESIDENT,
PACE LOCAL 5-550, PADUCAH, KY

My name is Leon Owens. I am employed as a "cascade operator" at the Paducah Gaseous Diffusion Plant (PGDP) in Paducah, Kentucky. I have been employed by Department of Energy (DOE) contractors, USEC (the government-owned corporation) contractors, and I am now employed by USEC, Inc. I serve as President of Local 5-550 of the Paper, Allied-Industrial, Chemical & Energy Workers Union (PACE), which represents hourly maintenance, production and environmental clean-up workers at the Paducah plant. My address is 315 Palisades Circle, Paducah, KY 42001. Phone: 270-554-7818 (h).

I serve on the Advisory Board on Radiation and Worker Health (ABRWH), which advises the Secretary of Health and Human Services on the implementation of NIOSH's responsibilities under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

OPERATIONS AT PADUCAH WERE EXTREMELY HAZARDOUS AND WORKERS WERE
UNPROTECTED FROM RADIOLOGICAL AND TOXIC CHEMICAL HAZARDS

On September 20, 2000, Senator Jim Bunning held an Energy Committee field hearing in Paducah to investigate claims about how workers at the Paducah Gaseous Diffusion Plant ("PGDP") were exposed to highly radiotoxic substances, particular plutonium and neptunium, for over 40 years without ever knowing or being monitored. During the cold war, the number one priority at the PGDP was the production of enriched uranium, and this took precedence over safety.

During the process of working with irradiated recycled uranium and converting it into uranium hexafluoride ("UF₆")—the feed material for the uranium enrichment plant—workers were unknowingly exposed to uranium dusts laced with plutonium-239, neptunium-237, and technetium-99. Until a *Washington Post* article appeared on August 8, 1999, most workers, including myself, did not know we were potentially exposed to plutonium.

When ambient air sampling was conducted in the 1960's, airborne concentrations were found in excess of 100 times the PGDP's maximum permissible level for neptunium-237. When the PGDP Health Physics Department surveyed the Converter Shop (C-720) in 1980, airborne levels of alpha emitting radiation exceeded the plant guidance by a factor of 1,680 for uranium, by a factor of 2,121 for neptunium-237,

and by a factor of 2,483 for plutonium-239.¹ AEC implemented a plan to keep workers in the dark about their exposures for over 40 years.

A 1960 Atomic Energy Commission memo entitled *Neptunium-237 Contamination Problem, Paducah, Kentucky*, stated:²

“There are possibly 300 people at Paducah who should be checked out [for neptunium exposure], but they are hesitant to proceed to intensive studies because of the union’s use of this as an excuse for hazard pay.” (Attachment “A”)*

Neptunium-237 concentrates in the liver and bones, and by mass, is 10,000 times more radiotoxic than uranium-238.³ With respect to the adequacy of respiratory protection, the memo added:

“I don’t have too much faith in masks, and the dust particles here are about 0.5 micron, the very worst size biologically speaking.”

Masks in that time period were WW-II vintage. There were filthy, hot, rarely worn, and would not have filtered particles that small. The memo also urged DOE’s contractor, Union Carbide, to:

“get post mortem samples on any of these potentially contaminated men for correlation of tissue content with urine output, but I’m afraid the policy at this plant is to be wary of the unions and any unfavorable public relations.”

Until 1991—40 years after the memo was issued—DOE’s contractor did not offer to test workers for uptake of neptunium, plutonium or technetium compounds.

What this memo and monitoring data makes clear is that the workers at PGDP were put in harm’s way knowingly and without adequate protections or monitoring. This was not mere happenstance. Conscious decisions were made not to notify or monitor workers for certain hazards out of public relations or fears of union demands.

Our members’ loyalty to the national defense mission of enriching uranium has never been in question. If called upon, we would do it again under the same conditions. However, this loyalty was not reciprocated by the government or its contractors.

Health and safety controls were quite minimal over most of the life of this plant. We had no external oversight from OSHA or the Nuclear Regulatory Commission until the Energy Policy Act of 1992 required the two enrichment plants in Ohio and Kentucky be subjected to external regulation. Tens of millions were needed to upgrade safety and health conditions before the NRC would provide a certificate of compliance.

- The Paducah site did not have a contamination control program for 40 years, leading to contamination of workers’ clothes, shoes and skin. The absence of controls led to workers tracking radioactive contamination off site and into their homes.
- Uranium fires self-ignited after workers dumped uranium chips into open pits. Workers poured dirt over the burning uranium to try to snuff it out, and had no respiratory protection.
- After the processing of neptunium and plutonium contaminated uranium stopped in the C-410 building, DOE converted it into an employee locker room and electrical repair shop for 13 years. Radiation was measured up to 350,000 dpm fixed in locker rooms. Shower and toilet areas had 175,000 dpm fixed. These areas should have been posted as contamination areas as this exceeded DOE’s 5000 dpm (fixed) threshold by 35-70 times.

SUMMARY OF FINDINGS FROM DOE’S INVESTIGATIONS

After the *Washington Post* articles about the whistleblower lawsuits at Paducah, the Department of Energy launched an in-depth assessment of historical worker safety practices at the three uranium enrichment plants. DOE’s 76-page *Independent Investigation of the Paducah Gaseous Diffusion Plant, 1953-1990*, details many of the hazards, including:

¹*Phase II Independent Investigation of the Paducah Gaseous Diffusion Plant, Environment, Safety and Health Practices 1952-1990*, U.S. Department of Energy, Office of Oversight/Environment, Safety and Health.

²*Neptunium-237 Contamination Problem, Paducah, Kentucky*, February 4, 1960, C.L. Dunham, MD, Director, AEC Division of Biology and Medicine and H.D. Brunner, MD, Chief of Medical Research, AEC Division of Biology and Medicine.

*Attachments have been retained in committee files.

³EPA Guidance Report No. 11.

- Acute and chronic exposures to chemical hazards such as trichloroethylene, PCBs and hydrogen fluoride (“HF”) occurred, and the potential risks of such exposures were not fully recognized by workers or the Health Physics and Hygiene department. Exposures to HF resulting in burns, respiratory distress, and bleeding were frequent in the 1950s and 1960s, and the potential long term health effects are unknown.
- There was a widespread belief that uranium did not present a significant health risk to workers. Consequently, eating, drinking and smoking in contaminated areas; failure to wash or remove contaminated clothing before entering the cafeteria; and wearing of contaminated clothing off site without monitoring occurred during this period.
- Asbestos has been a significant hazard at the plant since construction (1952). Asbestos fibers are carried into the body as airborne particles, and these fibers can become embedded in the tissues of the lung and digestive system. Once these fibers become trapped in the alveoli, they cannot be removed. However, asbestos hazards were not recognized, and routine monitoring of asbestos did not begin until the 1980s.

Until February 2000, DOE had never informed workers that beryllium was found at Paducah, although it had been previously identified in 1994, and was machined as part of a Cold War weapons dismantlement project. Worker testing for beryllium did not begin until September 2001 through the former worker medical screening program. Up to this point no one was protected from beryllium exposure.

MEDICAL MONITORING HAS UNCOVERED OCCUPATIONAL DISEASE AND SAVED LIVES

The DOE Worker Medical Screening Program at Paducah has screened approximately 1900 workers to date. Physicians have diagnosed lung disease for which there is an occupational contribution in 24% of the workers they have examined. These pulmonary diseases include asbestos related conditions, chronic bronchitis, silicosis and emphysema. In addition, 42 individuals had at least one positive blood test (beryllium lymphocyte proliferation test) for beryllium sensitivity and 1 case of chronic beryllium disease was identified.

We are grateful that the Appropriations and Armed Services Committees have directed DOE to fund the enhanced medical screening program at Paducah, Portsmouth and Oak Ridge K-25. This screening program includes a mobile early lung cancer detection unit that uses a low-dose CT scanning technology. This lung screening is saving lives because the low dose CT scanner is successfully identifying cancers at stage 1—the earliest stage—and increasing the odds of survival for type of cancer that is fatal 85% of the times when it is detected at stage 3.

SPECIAL EXPOSURE COHORT AND THE IMPLICATIONS FOR SUBTITLE D

Paducah workers were placed into a Special Exposure Cohort as part of EEOICPA. Claimants receive a presumption of causation if (1) they contract one of 2 radiosensitive “specified cancers”, (2) were employed for at least one year in a job that requires a radiation dosimeter, and (3) there is a 5-year minimum latency from first exposure to diagnosis for most cancers. Dose reconstruction is not required for those with the 22 “specified” cancers.

The Special Exposure Cohort is similar to the presumption provided to certain Atomic Veterans who contract a listed cancer. And although we were not on the battlefield, we worked in a government defense plant with ultra-hazardous materials as part of the nation’s defense, and as were every bit in harm’s way. Claimants confront an insurmountable burden of proof in a claim for compensation because the contractor decided not to monitor us for uptakes of extremely radioactive transuranic compounds for over 40 years.

DOE has not indicated how it will develop claims for radiation induced cancers for Special Exposure cohort sites, because NIOSH is not going to be performing radiation dose reconstruction on the workers who are in the Special Exposure Cohorts. H.R. 1758 proposes that the presumptions for membership in the Special Exposure Cohort also be applied to Subtitle D claims. A DOE policy is needed for those who are in Special Exposure Cohorts and filed cancer claims under Subtitle D.

⁴Larynx cancer should be added as a listed cancer for members of the Special Exposure Cohort. Epidemiology studies of workers at Linde in Tonowanda, NY indicate a SMR of 4.47 for larynx cancer.

CLAIMS PROCESSING: DOE VS. DOL AT PADUCAH

At Paducah, only 1 out of 2,215 claims that were filed at Paducah under Subtitle D have moved through the DOE physicians panel as of 11/1/03. Not a single claim has been paid through DOE's Subtitle D program at Paducah.

By contrast, the Department of Labor has issued 2,469 recommended decisions out of 3,393 cases filed by Paducah claimants, with 918 recommended approvals and 1,551 recommended denials. DOL has paid \$125.2 million paid to Paducah claimants as of October 29, 2003. Most of these payments are to members of the Special Exposure Cohort. DOE's performance is simply inexcusable.

THE HARDING CASE

On August 9, 2001—a week after the program formally started operations—DOL issued its first payment of \$150,000 to Clara Harding, the widow of Joe Harding.

This first payment was very significant. Mr. Harding died at age 58 in March 1980 of abdominal cancer. He worked at the Paducah plant for nearly 20 years, from 1952 until 1971, and was found with dramatically elevated levels of uranium in his bones after he died. Mrs. Harding battled DOE for 15 years to gain a survivor benefit under Kentucky's state worker compensation law, and failed on a legal technicality—statutes of limitations—after the DOE and its contractor spent in excess of \$1 million to defeat a claim that would have settled for \$50,000. The DOE's efforts to defeat Mr. Harding's case were detailed in a front page *Washington Post* story in 1999. It is cases like Mrs. Harding's that underscore the need to get DOE out of the business of fighting sick workers.

ISSUING REGULATIONS: DOE VS. DOL

Although DOE staff had developed regulations by June 2001, DOE's management failed to make this rulemaking a priority and did not finalize Physician Panel regulations for 18 months until September 2002.

By contrast, DOL issued its Interim Regulations on May 15, 2001 and they were used for deciding claims when EEOICPA formally began operations on July 31, 2001.

THERE IS NO WILLING PAYOR FOR MANY CLAIMANTS AT PADUCAH

Besides the glacial pace of claims processing, many of the valid claims at Paducah will not have a "willing payor." A willing payor is an entity which DOE can meaningfully direct to pay claims after a Physicians Panel renders a positive determination.

GAO indicates in its preliminary briefings to Congress that at least 50% of the Paducah claimants will not have a "willing payor." We suspect that GAO's final conclusions will indicate that this percentage is higher. There are several reasons for the absence of a willing payor at Paducah.

- DOE cannot direct USEC, Inc., which was privatized and leases the Paducah Gaseous Diffusion Plant, to serve as a "willing payor."
- DOE cannot direct Aetna or other insurance companies to pay claims on insurance policies they issued decades ago for Paducah contractors like Union Carbide. DOE has not clarified if Bechtel Jacobs, which is self-insured, will assume responsibility at Paducah for all claims that were "owned" by Aetna or others.
- Many of Paducah's subcontractors used private worker compensation insurance carriers to provide worker compensation insurance. Private insurers are not bound by DOE physician panel determinations.

Let me give you an example. My co-worker, Rod Cook, age 54, is a plant Superintendent at USEC who contracted pleural fibrosis from his years of breathing asbestos in the course of his job as a plant operator. Last year he started coughing up blood. Surgeons had to remove a portion of his lung and several feet of lung tissue removed that had built up around his lung.

In May 2002, Rod filed a claim with DOE under Subtitle D of the Act. He didn't get a claim number for 18 months—until a couple of weeks ago. He was finally asked for his medical records for the first time a few weeks ago. What took so long?

Rod is back to work, luckily, and has only lost 20% of his lung function at this time, but should he become disabled, he has no way to replace his lost income.

In the meantime, Rod is seeking to have his out of pocket medical costs paid related to his lung surgery under Subtitle D. USEC is not a willing payor. Aetna insured Union Carbide when they ran the plant. Aetna is not a willing payor. Who will own responsibility for paying Rod's claim? If Rod becomes disabled, as many

are, will they have to wait for years while DOE looks for a willing payor? Or should Congress step in and assure a willing payor for valid claims?

The September 13, 2002 Memorandum of Agreement between the Commonwealth of Kentucky and DOE makes it plain that DOE cannot bind the state or private insurance companies to honor the findings of a DOE physicians panel. The MOA states in Section 2:

“A positive determination pursuant to [DOE’s Physician Panel] has no effect on the scope of State workers’ compensation proceedings, the conditions for compensation, or the rights and obligations of participants in the proceedings; provided that consistent with subtitle D such a determination will prevent DOE and may prevent a DOE contractor from contesting an applicants worker compensation claim.”⁵

Even a non-lawyer like myself can see that this Memorandum of Agreement allows the Commonwealth of Kentucky, if it so chooses, to disregard a Physicians Panel determination when evaluating a state worker compensation claim. Moreover, Kentucky will not agree to bind an insurer or employer to a DOE Physicians Panel finding.

WHEN EEOICPA WAS PASSED, CONGRESS KNEW SUBSEQUENT ENABLING LEGISLATION
WAS NEEDED

When EEOICPA was finalized in the House-Senate Conference Committee of the FY 01 Defense Authorization Act in October 2000, many important implementation issues were left unresolved. Thus:

1) EEOICPA required GAO to assess of the effectiveness of the Subtitle D program and report to Congress by February 1, 2002. However, DOE’s slow progress in developing its Subtitle D program added another year to the wait before GAO could provide recommendations; and

2) EEOICPA required that not later than March 15, 2001, the President shall submit to Congress a proposal for legislation to implement the compensation program, including costs, number or workers covered and specific recommendations (including draft legislation) of the President for the following:

“(1) The types of compensation and benefits, including lost wages, medical benefits, and any lump-sum settlement payments, to be provided under the compensation program.

(2) Any adjustments or modifications necessary to appropriately administer the compensation program under part B of this subchapter

(3) Whether to expand the compensation program to include other illnesses associated with exposure to toxic substances.

(4) Whether to expand the class of individuals who are members of the Special Exposure Cohort (as defined in section 7384l(14)) of this title.” (42 U.S.C. 7384f)

This administration did not forward a legislative proposal, and the one provided to Congress by the Clinton Administration in 2001 in the hours prior to the inauguration of President Bush was never considered. If the Administration has no solutions to offer, we would be grateful if Congress stepped in and designed a fix.

CONGRESS SHOULD REFORM EEOICPA BY DIRECTING DOL TO PROCESS CLAIMS, RUN THE
PHYSICIANS PANELS AND SERVE AS A WILLING PAYOR

The architecture of Subtitle D is based on the premise that DOE could assist claimants with securing state worker compensation claims. This is plainly unworkable. Moreover, DOE lacks the capacity to effectively carry out the basic claims development and management of physicians panels. The Grassley-Murkowski amendment was a constructive first step. A November 9, 2002 *Paducah Sun* editorial entitled *Failure Rewarded* noted that “common sense” got “trashed” with the defeat of the Grassley amendment (Attachment “B”).

A willing payor must be established soon. The Energy Workers Compensation Act (S. 3058) introduced last year by Senators Bingaman and Bunning established DOL as the “willing payor” for all valid claims. It relies upon the Federal Employee Compensation Act (FECA) as a framework for setting benefit levels. It is plain that DOE cannot assure that every valid claim will have a “willing payor.” To give workers a Physicians Panel determination and then tell them “Sorry there is no one to pay the claim” perpetrates a cruel and unfortunate hoax. So far the only winner is under

⁵Memorandum of Agreement between the U.S. Department of Energy and the Commonwealth of Kentucky, September 13, 2003.

Subtitle D is SEA, DOE's support service contractor, who makes money no matter how badly workers fare in this system.

A credible solution to fixing this program is to move all three key responsibilities to the DOL (1) claims processing, (2) physicians panels, and (3) payment responsibilities. Records retrieval will remain with DOE.

SUMMARY

DOE's poor performance and broken commitments make it clear that it is time to change agencies. DOE has failed in its claims processing responsibilities, and has yet to solve the problem of "willing payors." Three years is plenty long enough for DOE to get the program operational.

Claimants are ill and dying and really don't have time for DOE to learn on the job. A cynical person might observe that the costs of this program decline as people die off. DOE's consultants have warned that EEOICPA Subtitle D may generate unanticipated costs for DOE's Environmental Management Program.⁶ Thus, the perverse logic of delay may not be far off the mark.

What is equally troubling is that the Office of Management and Budget refuses to provide any adult supervision. Rather they are embracing failure by increasing funding while the federal officials and their contractors—no matter how well intentioned—are still learning on the job. There are professionals who can do a better job at the DOL and it is time to turn it over to them. Congress should not invest any longer in a failing program.

Thank you for your consideration.

Senator BUNNING. Thank you, Mr. Owens, for your testimony.
Dr. David Michaels.

STATEMENT OF DAVID MICHAELS, Ph.D., PROFESSOR, GEORGE WASHINGTON UNIVERSITY

Dr. MICHAELS. Thank you, Mr. Chairman.

I served as Assistant Secretary of Energy for Environment, Safety and Health from 1998 to January 2001. I am honored the committee invited me to provide testimony today. The first time I testified in Congress was my Senate confirmation hearing in this very room just over 5 years ago.

I will summarize my written testimony. Before the late 1990s—

Senator BUNNING. We will accept the whole thing for the record.

Dr. MICHAELS. Thank you, sir.

The Department of Energy had a longstanding policy to fight all claims made by nuclear weapons workers that chemicals and radiation may have caused them to be sick. This ended with the historic initiative culminating in Congress passing this legislation on a bipartisan, virtually unanimous basis. Most of us believed that the new structure authorized in subtitle D would overcome that old policy, known in the Forrestal Building as "deny and defend," and would ensure that the goal shared by Congress and the administration of providing timely, adequate, and uniform levels of compensation could be reached.

Senator, I am here to tell you that we were wrong. The structure I recommended has failed. It is with real sadness and disappointment that I have returned to this chamber to report that DOE has demonstrated it is either unwilling or incapable of implementing this program. As a result, it is now time for the Congress to re-

⁶*Workers' Compensation Costs in the DOE/EM Program*, PWC Consulting, March 18, 2002. The report stated at Section 2.3: "Four of six sites we interviewed expressed significant concerns about the Potential for an increase in new state WC claims from former workers. Two drivers were generally cited: EEOICPA, and DOE-sponsored health screening programs for former workers."

evaluate the role and responsibility of the Energy Department in helping sick workers.

My written statement reviews the genesis of the program. One anecdote I should just repeat here. Pete Lopez, who testified in front of Congress when this was being considered, was diagnosed with beryllium sensitivity. DOE's contractor physician made the diagnosis, helped him fill out the Texas State Workers Compensation form, sent it in to DOE's third party administrator because DOE was self-insured, and DOE's third party administrator did what it always did for DOE: It denied Mr. Lopez's claim.

I attached the form to my testimony that Mr. Lopez received in the mail. It is a standard form saying: "Carrier denies this claim because it is an ordinary disease of life to which the general public is exposed." It was that sort of attitude we were trying to overcome. This is beryllium disease. Mr. Lopez did not get beryllium disease on the golf course. He got it assembling nuclear weapons at Pantex.

This did not occur in the bad old days. Mr. Lopez filed his claim in the year 2000. He received his denial in 2000.

But the purpose of subtitle D was not merely to determine work-relatedness. It was for DOE to step up to the plate and start acting like a responsible employer. If a panel of independent physicians determined the case was work-related, DOE would actively assist that worker in getting State worker compensation benefits. That is why we called the office "the Office of Worker Advocacy."

One of the things I did as Assistant Secretary is I got on the phone and called contractors up when cases were work-related and said: This case should be taken care of, and they were. I probably got more people—I did get more people compensated just by getting on the phone than DOE has done in this entire program.

DOE made a series of decisions that resulted in a program that will compensate as few people as possible, as slowly as possible, and I outline them in my testimony. I think they hired a contractor with no background in workers compensation. More tragically, they ignored the expert advice of the advisory committee, several members of whom—Don Elisburg and John Burton—are sitting on this panel, and then eventually had to bring in an outside consultant to tell them some of the same things the advisory committee could have told them 2 years earlier.

I do not agree with DOE's interpretation that nothing can be done, that they have no authorization to go beyond essentially putting the worker through a physicians panel and helping them fill out a form. I think there are a number of solutions they could take on. But putting that aside, I think everyone in this room understands that when DOE—DOE leadership is not shy about suggesting new authorization language for initiatives it supports. Yet in the many months since this program has begun, DOE has never suggested a legislative solution or any other solution to this problem.

What advice would I give you now? There is no question in my mind this program could be managed far more effectively and efficiently by the Department of Labor. Secondly, there are many workers in this country for whom no benefit payor has been identified. This is a situation reminiscent of the Radiation Exposure Compensation Act of a few years ago. Congress recognized the gov-

ernment cannot tell a sick worker or worker's survivor that, yes, your disease was caused by helping the Nation win the Cold War, you are deserving of benefits, but we just cannot pay you. We need to resolve that.

Finally, another resource the Department of Energy has is its former worker medical surveillance program. Rather than using this resource to help adjudicate claims, which DOE has orders to allow it to do, DOE has announced it is phasing out the program. I would like to see Congress intervene in that as well.

Senator Bunning, it is only 3 short years since the members of this body enacted EEOICPA on a bipartisan, unanimous basis. Together, 3 years ago we mounted this noble effort to make peace with the past, to repay those who made great sacrifices for their country. I ask you not to let this historic initiative fail.

[The prepared statement of Dr. Michaels follows:]

PREPARED STATEMENT OF DAVID MICHAELS, PH.D., PROFESSOR,
GEORGE WASHINGTON UNIVERSITY

Thank you Mr. Chairman.

My name is David Michaels. I served as Assistant Secretary of Energy for Environment, Safety and Health from 1998 to January 2001. In that role, I had chief responsibility for protecting the health of workers, communities and the environment around the nation's nuclear facilities. I am honored that the Committee invited me to provide testimony here today. The first time I testified in Congress was my Senate confirmation hearing, in this very room, just over five years ago.

I was no doubt invited to testify today because I am considered to be the architect of the EEOICPA. Under Secretary Bill Richardson's direction, I conceived of the original proposal, sheparded it through the inter-agency process, and worked closely with Congress, including several members of this Committee, through its passage and enactment into law. I helped write the Executive Order, which assigned responsibilities for the program to the Departments of Labor, Health and Human Services, Energy and Justice. I continue to be associated with the program—I am currently a consultant to the Department of Labor. Needless to say, the views expressed in my testimony today are purely my own.

Before the late 1990s, the Department of Energy had a long-standing policy to fight all claims made by nuclear weapons complex workers that chemicals and radiation may have caused them to become sick. This ended with the historic initiative that culminated with passage of EEOICPA. The Secretary of Energy, Bill Richardson, apologized to workers who had been lied to. On a bipartisan, virtually unanimous basis, Congress passed EEOICPA, providing a new workers compensation program in the nuclear weapons industry. Most of us thought that this was a permanent change, and that the Energy Department was poised to help workers. Most of us believed that the new structure described in Subtitle D would overcome that old policy—known in the Forrestal Building as “Deny and Defend”—and would ensure that the goal shared by Congress and the Administration—providing timely, adequate and uniform levels of compensation—could be reached.

Senators, I am here to tell you that we were wrong. The structure I recommended has failed.

As many of you will recall, when you and your colleagues were considering how to compensate these civilian cold war veterans, Senator Voinovich introduced bipartisan legislation (S. 2519) that would have placed the entire EEOIPCA program at the Department of Labor.

I personally assured Senator Voinovich, Senator Bingaman and other members of Congress that the Department of Energy was the appropriate place to house the program that would assist these workers to obtain state workers compensation benefits.

In retrospect, it is now clear to me that this is not the case. It is with real sadness and disappointment that I have returned to this chamber to report that the Department of Energy has demonstrated that it is either unwilling or incapable of implementing the program authorized in the EEOICPA.

Rather than serve as advocates for sick workers, DOE's leadership appears to have designed an implementation strategy that will not fulfill the clearly stated objectives of the EEOICPA legislation—not merely to operate physician panels but to

assist and advocate for sick workers to ensure that they actually get compensation in state programs. Sadly the DOE strategy is working—it is more than three years since the Congress enacted EEOICPA, and DOE has not yet paid compensation benefits to a single sick worker under subtitle D of the Act.

As a result, it is now time for the Congress to re-evaluate the role and responsibility of DOE in helping sick workers.

I'd like to spend a few moments reviewing the genesis of the program.

In my confirmation hearing in front of this Committee in 1998, the Chairman, Senator Frank Murkowski, asked me to examine the claims of widows of DOE contractor employees who had been exposed to radiation working around a series of underground nuclear detonations in Amchitka, Alaska. I subsequently heard from sick workers and their survivors, and from members of Congress representing these individuals, from Washington State to South Carolina, from Los Alamos to Oak Ridge.

I talked to these workers, and their survivors, in public meetings around the country. Members of Congress attended these meetings, and heard, with me the stories of these cold war veterans, civilians who put themselves in harm's way so that our nation could triumph, first in World War Two, and then in the Cold War.

At these public meetings, and through my staff's investigations into working conditions in the nation's nuclear weapons plants, we documented the disturbing history of the U.S. government's denial of the obvious—the Atomic Energy Commission (AEC), and then the DOE, hand in hand with its contractors, had a policy of denying that working with some of the most hazardous materials ever invented had made workers sick. When workers claimed to be sick, boundless resources were expended to fight them.

Two documents from the earliest years of the AEC, uncovered in the investigation into human radiation experiments,¹ are illustrative of this policy. The first is a 1947 memo from Oak Ridge Operations to AEC headquarters. It highlights the AEC's desire to limit liability and fear associated with hazardous exposures:

Papers referring to levels of soil and water contamination surrounding Atomic Energy Commission installations, idle speculation on future genetic effects of radiation and papers dealing with potential process hazards to employees are definitely prejudicial to the best interests of the government. Every such release is reflected in an increase in insurance claims, increased difficulty in labor relations and adverse public sentiment.²

A similar sentiment is seen in a 1948 memo about a Los Alamos study that found health effects from gamma radiation exposure at levels previously thought to be safe. The memo, from the AEC's Insurance Branch to the Declassification Branch, called for "very careful study" before releasing the report:

We can see the possibility of a shattering effect on the morale of the employees if they become aware that there was substantial reason to question the standards of safety under which they are working. In the hands of labor unions the result of this study would add substance to demands for extra-hazardous pay knowledge of the results of this study might increase the number of claims of occupational injury due to radiation and place a powerful weapon in the hands of a plaintiff's attorney.³

This attitude appeared to continue throughout the Cold War period. In 1999, a suit was filed alleging that the contractor at the Paducah Gaseous Diffusion Plant had concealed evidence of environmental contamination by plutonium and other transuranic substances. In response, I sent a team to investigate. Their work wasn't easy—the oversight team I sent down, a group of very talented and dedicated civil servants, had to search through documents that had been stored in barrels that were contaminated with radioactive waste.

The team documented a legacy of poor safety and health practices that went on for decades. Paducah workers were never warned that the uranium that was contaminated with plutonium and neptunium.

Among the documents that we uncovered was one written by two senior AEC physicians who were evaluating the neptunium 237 contamination problem in the Paducah plant in 1960. Permit me to read some passages from that memo:

¹Advisory Committee on Human Radiation Experiments. Final Report. Oxford University Press, 1996.

²Franklin, JC. Manager, Oak Ridge Operations, to Carroll L. Wilson, AEC General Manager, 26 September 1947 ("Medical Policy") (ACHRE No. DOE-113094-B-3).

³Wilson, CE. Chief, Insurance Branch, to Anthony C. Vallado, Deputy Declassification Officer, Declassification Branch, 20 December 1948 ("Review of Document by Knowlton") (ACHRE No. DOE120894-E-32).

The workers are supposed to wear special face masks but they are not controlled too closely . . .

Np237 [neptunium] can now be detected in urine but not consistently . . .

Np237 seems to be found only in reclaimed feed materials provided by Hanford . . .

There are possibly 300 people at Paducah who should be checked out but they hesitate to proceed to intensive study because the union's use of this as an excuse for hazard pay.⁴

But, you're probably saying, that was along time ago, in the bad old days. Senators, I wish that were true. I want to tell you a story I heard from Pete Lopez, who was exposed to beryllium assembling and disassembling nuclear weapons at the Pantex facility, in Amarillo Texas. (I am using Mr. Lopez's name here because it is public he testified at the hearing of the House Judiciary Committee in 2001, and told his story there, as well.⁵)

Beryllium causes a progressive, sometimes fatal lung disease. There are hundreds of cases of beryllium disease or among workers exposed in the weapons complex, because beryllium is an important component in nuclear weapons.

Mr. Lopez was diagnosed as having beryllium sensitivity, an early stage of beryllium disease, by a DOE contractor's physician. The doctor encouraged Mr. Lopez to apply for Texas state workers compensation, and helped him fill out the form. It was sent to DOE's third party administrator because the Pantex facility is self-insured for workers compensation. Predictably, DOE's third party administrator did what it had always done for DOE, it denied Mr. Lopez's claim. A copy of the claims denial is appended to my testimony; * I'd like to read you what Mr. Lopez was told:

Carrier is filing a formal denial that the employee has sustained an injury or occupational disease within the course and scope of employment or has sustained a work related injury or disease. Carrier further denies the occupational disease in that it is an ordinary disease of life, to which the general public is exposed.

Please remember: this did not occur decades ago, in the bad old days. Mr. Lopez filed his workers' compensation claim in 2000. Mr. Lopez isn't alone. There are thousands of other workers who have illnesses that may be associated with exposure in the nuclear weapons plants.

In listening to these workers' stories and reading these documents, it became clear to me that DOE did not have the credibility to determine whose diseases were work-related and whose weren't, so we crafted a legislative proposal that would allow an independent adjudication of claims.

But it was more than that. The purpose of Subtitle D was not merely to determine work-relatedness. It was for DOE to step up to the plate and start acting like a responsible employer. If the panel of independent physicians determined a case was work related, DOE would actively assist that worker in getting state compensation benefits.

This would involve instructing the contractor to accept the claim (and there is clear language that DOE would tell contractors they could not reject the claim). In many cases, the costs of that claim would be sent directly back to the appropriate DOE office.

It was understood that DOE, or its contractors, could legally accept compensation claims even if the statute of limitations had passed. And that DOE would actively work to get sick workers, the ones found by physician panels to have occupational illnesses into the system.

To jump start the program, Secretary of Energy Richardson issued Order 350.6, which enabled DOE and its contractors to begin compensating workers with obvious occupational illnesses without having to wait for the physician panels. Under 350.6, DOE contractors were required to accept as work-related the diagnoses of occupational illness made by the physicians they employed, or those employed by DOE's former worker medical surveillance program, and not to contest these claims.⁶

⁴Dunham, CL, Director, AEC Division of Biology and Medicine and Brunner, HD, Chief of Medical Research, AEC Division of Biology and Medicine. Neptunium-237 Contamination Problem, Paducah, Kentucky, February 4, 1960.

⁵Lopez, P. Testimony Before the Subcommittee on Immigration and Claims of the Committee on Judiciary, U.S. House of Representatives, September 21, 2000 Concerning Obstacles to Workers Compensation for Beryllium Disease at the Pantex Facility. Available at: <http://www.house.gov/judiciary/lope0921.htm>

* Retained in committee files.

⁶DOE Order 350.6. Acceptance of Valid Workers' Compensation Claims. January 12, 2001. Available at: <http://www.directives.doe.gov/pdfs/doe/doetext/neword/350/n3506.pdf>

If DOE had truly wanted to make this program work, it could have immediately implemented Order 350.6. Instead, workers who DOE has already acknowledged to have work related illnesses will have to wait years, in some cases, many years, to have their records reviewed by additional physicians. In the end, they will likely make the same diagnoses, but at the additional cost of several thousand dollars.

I have heard DOE leadership claim that they were overwhelmed by the volume of cases, and that it is far more cases than we (and specifically I) predicted. Those in this room who were involved in the enactment of EEOICPA will remember that the Administration's legislative proposal, and the version passed by the senate, was quite different than the final legislation. In our proposal, Subtitle B included wage loss benefits and was the exclusive remedy for workers with beryllium disease and radiation related cancer. This was changed significantly, and in my view unfortunately, in negotiations between the Senate and the House. As a result, thousands of workers who in the original proposal could only have applied to the DOL program, now apply to both.

Congress recognized in the initial legislation that this was a work in progress; the legislation specifically called for further legislative improvements. The drafters recognized that problems like the ones being discussed today might arise, and prompt oversight by the GAO. Unfortunately, the GAO could not provide that oversight because the DOE program had not progressed enough to warrant GAO's effort.

I am disappointed to report to this committee that DOE leadership made a series of decisions to set up a program that will compensate as few people as possible, as slowly as possible.

In the more than three years since the legislation was enacted, DOE has failed to hire a manager for this program who has any experience or expertise in managing workers compensation programs. Then, DOE compounded the problem by hiring a contractor with no background in workers compensation systems. With this contractor's help, DOE designed a system from which it is difficult to get even the most basic statistical information, such as what illnesses are described by claimants or where claimants worked.

DOE ignored the expert advice of an Advisory Committee composed of some of the nation's leading thinkers on workers compensation, and designed procedures without consulting with the Advisory Committee. After the minimum period, DOE disbanded the Advisory Committee. I am told that DOE has finally hired a consulting firm to provide, at significant cost and delay, much of the same information the Advisory Committee was trying to provide two years ago.

Another valuable resource DOE could have utilized is the network of clinics and physicians of DOE's own former worker medical surveillance program. Order 350.6 was written expressly to enable DOE to call on these physicians, many of whom have international reputations, to assist in adjudicating these claims. Instead, Assistant Secretary Cook has announced that most of these programs will be ended shortly. While Assistant Secretary Cook claims the phase-out will allow her office to fund new medical surveillance programs in locations not previously served, the recently released "Strategic Plan for the Office of Environment, Safety and Health, 2003-2006"⁷ fails even to mention the program, suggesting its permanent demise is planned.

And, most tragically, while spending millions to administer this program and process paper, DOE has apparently decided that their job ends with the physician panel it will do nothing to get workers into state compensation systems.

Again, I call your attention to the Strategic Plan. There is no mention of assisting sick workers get the compensation they deserve. The primary objective listed for EEOICPA is to "process applications for Subpart D." The strategic indicators focus on improving efficiency and reducing backlog, but not on helping workers.

When the Administration proposed this program, and when Congress enacted it, it was envisioned that DOE would advocate for its workers DOE would actively try to help the people made sick making nuclear weapons. Instead, DOE leadership has interpreted the EEOICPA legislation as narrowly as possible, to ensure that the assistance given sick workers will be kept to a minimum. DOE leadership says no mechanism can be found to compensate sick workers in Iowa, or Ohio, or Alaska, or in other situations where there is no willing payor.

I have heard DOE's claim that the EEOICPA authorization is limited, and little can be done beyond submitting a claim to a physician panel and helping a sick worker fill out a claim form. I do not agree with this interpretation, but, putting that aside, I think everyone in this room knows that DOE leadership is not shy about suggesting new authorization language for initiatives it supports. Yet in the

⁷ Strategic Plan for the Office of Environment, Safety and Health, 2003-2006. Available at: <http://tis.eh.doe.gov/portal/feature/EH Strategic Plan FINAL.pdf>

many months since this program began, DOE has never suggested a legislative solution (or any other solution) to this problem.

What advice would I give you now?

It is clear that DOE leadership cannot, or will not, operate this program effectively. Trust in the agency has been lost and cannot easily be regained. There is no question in my mind that this program could be managed far more effectively and efficiently by the Department of Labor, which already operates Subtitle B of EEOICPA, as well as the FECA program, the largest workers compensation program in the country, a program that covers most of the people in this room.

Secondly, there are many workers around the country for whom no benefits payor has been identified. The situation in which sick workers are given positive determinations of work-relatedness by DOE physician panels, and then have no one to turn for workers compensation benefits is reminiscent of the crisis facing the Radiation Exposure Compensation Act a few years ago. In that situation, Congress recognized that the government cannot tell a sick worker, or that worker's survivor, that yes, your disease was caused by helping the nation win the Cold War, and you are deserving of benefits, but we just can't pay you.

To address this, legislation is needed to provide mandatory funding for compensation benefits for claimants who are found to have work-related conditions under this program.

Finally, Congress should not permit DOE to abandon its commitment to providing medical surveillance for former workers throughout the complex.

Senators, it is only three short years since the members of this body enacted EEOICPA on a virtually unanimous bipartisan basis. Together, three years ago, we mounted this noble effort to make peace with the past, to repay those who made great sacrifices for their country. I ask you not to let this historic initiative fail.

Senator BUNNING. Thank you for your testimony, doctor.

Mr. Richard Miller, please.

**STATEMENT OF RICHARD MILLER, SENIOR POLICY ANALYST,
GOVERNMENT ACCOUNTABILITY PROJECT**

Mr. MILLER. Thank you, Mr. Chairman. My name is Richard Miller. I serve as a Senior Policy Analyst at the Government Accountability Project. GAP tracks the implementation of this law and serves as an information hub for claimants, unions, injured worker groups, and the media.

Again, as Dr. Michaels said, I want to commend both you for your efforts in the course of trying to get this legislation passed. We all know how difficult that conference was, and there were a number of questions that were left unresolved. We also particularly appreciate your effort to provide both oversight, promote reforms, and to bring this hearing to fruition.

I have two basic points I would like to leave you with today, in many respects restating what you have heard earlier. First, in the 3 years since enactment DOE has failed to competently implement subtitle D in the primary areas of its responsibility—claims development, physicians panel operations, and assuring that there is a willing payor.

Secondly, that legislative reforms in our view should direct the Labor Department, which runs four separate worker compensation programs, including the Federal Employee Compensation Act, the Longshore and Harbor Workers Act, the Black Lung Benefits Program, and of course subtitle D of this program, to process claims and also serve as the willing payor, while DOE recovers the needed records and receives the resources to do so.

When Congress defined the law's purpose, it said it wanted to provide for timely, uniform, and adequate compensation of covered employees. That is right up front at the beginning of the law. So I guess we differ with the interpretation that Mr. Card has. What

we do not disagree on, I hope, is that that goal is not being met today.

DOE's main product under subtitle D is a physicians panel determination, and what we know about subtitle D is that subtitle D did not provide a means to assure, guarantee, the payment of claims. Thus even if claims payment were proceeding apace as we would hope, the physicians panel determinations carry no legal weight with the States, and in our view we have to establish a willing payor for everyone, not just those with self-insured prime contractors.

We also believe that the GAO's initial assessment, which was approximately 15 percent do not have a willing payor, may understate the case because DOE's database it now turns out is unauditable with respect to who was the last employer, and thus GAO has had great difficulty in finding out how big the problem is.

In evaluating DOE's actions over the past 3 years, as opposed to its words and intentions, we have concluded that DOE seems disinclined or incapable of remedying the basic flaws in this program. One of the operative questions for me is why is DOE fighting so hard to keep this program from being transferred to the Labor Department?

Now, the Grassley-Murkowski amendment was an interim step. It only dealt with claims processing and management of physicians panels. It did not deal with the willing payor. And it was an incremental step that was proposed. But why did DOE fight that? When Mr. Card testified earlier, he said because it would lead to undue delays. Yet the Grassley amendment eliminated the need, for example, to be delayed while new rulemaking was done because they would use the Energy Department's old rules in the interim. They would also provide for the Energy Department to have resources to recover records.

So in our sense, why is it that DOE is so attached to a failing program? Why do they not want to let it go? It has nothing to do with, in our view, accountability, because today under subtitle B claims are taken out of DOE and they are shifted over to the Department of Labor, just as they would be if subtitle D were transferred and moved from one agency to the other. DOE would do what it has its core capacity to do, which is direct its contractor to produce records.

We are troubled that DOE has not begun development on 71 percent of its claims. By contrast, the Labor Department began paying claims a mere 75 days after its regulations were issued. And DOE's own consultants that were brought in to advise its contractor, DOE's contractor, said that the program suffers from "design flaws."

We are also troubled that DOE has stonewalled State worker compensation programs who have actually offered to solve the willing payor problem. For example, the State of Ohio Bureau of Worker Compensation Programs proposed last December to become a willing payor and after DOE rejected this offer, handed to them on a silver plate, here is what the Ohio BWC Director said: "What troubles me more than the length of time it has taken DOE to respond is the lack of alternatives your staff has proposed to help get

this program off the ground.” That letter is attached to our testimony.

When DOE presented its fiscal year 2003 budget request to Congress, it promised to move claims quickly by developing exposure profiles. But to date DOE has completed none of these exposure profiles.

Moreover, of the 56 claims approved by the physicians panels to date nationwide, we are not aware of any of those 56 being paid and, moreover, DOE has no system to even track the payment status of those claims. As you noted in a question earlier, it appears the only one getting money out of this program is DOE’s support service contractor and, with a large budget increase to DOE, it will be tens of millions more.

I see my time is running out. In conclusion, some have suggested that DOE retain non-risk-bearing third party administrators to serve as a payor. We think DOL should be both the claims administrator and the willing payor, using the Federal Employee Compensation Act as guidance for benefit levels. We recommend that either NIOSH or the DOE former worker medical screening program do the exposure assessments that have not been done.

In conclusion, it makes no more sense for Congress to assign a major worker compensation program to DOE than it does to assign a nuclear weapons production program to the Department of Labor. [The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF RICHARD MILLER, SENIOR POLICY ANALYST,
GOVERNMENT ACCOUNTABILITY PROJECT

Mr. Chairman and Members of the Committee, I am Richard Miller, a senior policy analyst at the Government Accountability Project (“GAP”).¹

Subtitle D of EEOICPA was intended to take the Department of Energy (“DOE”) out of the business of fighting valid state workers’ compensation claims brought by sick nuclear workers who were employed by DOE contractors. Congress intervened to reverse DOE’s history of fighting claims. Congress defined EEOICPA’s purpose: “to provide for timely, uniform, and adequate compensation of covered employees” That goal is not being met today.

What Subtitle D provides is a Physicians Panel determination, which, if positive, would lead to DOE directing its contractors not to contest claims with state worker compensation systems. What Subtitle D didn’t provide is a means to assure payment of claims. States are not bound by DOE Physicians Panel findings. Even if claims development were proceeding at a reasonable pace, the basic design of Subtitle D suffers from a basic flaw: Physicians Panel determinations carry no legal weight with states. To make Subtitle D work, a “willing payor” must be established for all valid claims.

The DOE’s program has deficiencies in three areas: (1) claims development; (2) physician panel operations; and (3) claims payment through a “willing payor”. Despite advice from its Advisory Board and Congress, DOE seems disinclined or incapable of remedying the basic flaws in this program. We suggest that Congress shift Subtitle D to the Department of Labor (“DOL”). No matter how well intended the Secretary and DOE staff may be, DOE is still learning on the job and claimants are dying without resolution of their claims.

I. DOE’S CLAIMS PERFORMANCE IS ABYSMAL; PROSPECTS FOR DRAMATIC IMPROVEMENT
ARE LIMITED; AND ALL “WILLING PAYOR” PROPOSALS HAVE BEEN REJECTED

- Despite a commitment by the Secretary to the Senate Energy Committee in February 2003 to move 100 claims per week through its Physicians Panels by

¹ Miller testified on EEOICPA before the Senate HELP Committee, Subcommittee on Employment, Safety, & Training, May 15, 2000, and the House Judiciary Committee, Subcommittee on Immigration & Claims (<http://www.house.gov/judiciary/mill0921.htm>) on September 21, 2000. GAP assists claimants and monitors the activities of the three federal agencies implementing EEOICPA, in addition to its core work on behalf of whistleblowers.

August 2003, DOE processed a total of only 109 out of 19,690 eligible applications (0.5%) through the Physicians Panels by November 11, 2003. There are 56 positive and 53 negative determinations. These determinations are DOE's main "product" under Subtitle D.

- Congressional inaction with respect to funding does not explain DOE's failure to meet this commitment. When Congress asked DOE on three occasions whether it needed more funding in early 2003, DOE wrote "no" we have enough funding. DOE announced it needed a 368% budget increase on July 30, 2003 when it was clear that the 100 claims/week commitment by August wasn't going to be honored.
- Under Subtitle B, the DOL has completed 95% of its 35,000+ claims including medical evaluations within its area of responsibility, and paid out almost \$700 million in benefits to energy workers and uranium miners in 2+ years. DOL takes an average of 80-102 days to process a claim under Subtitle B (FY03—4th quarter). DOL processes claims based on records and employment data received from DOE. Splitting responsibility between DOL and DOE has not resulted in a loss of accountability.
- DOE has not even begun development on 75% of its claims. By contrast, DOL began paying claims a mere 75 days after its regulations were issued. DOE could have processed thousands of beryllium, silicosis and asbestosis claims very rapidly, had it geared up.
- When DOE presented its FY 03 budget to Congress, it promised to move claims quickly by developing "exposure profiles" that detail toxic chemical exposures at each of its major sites. Specifically DOE wrote:

"As more information is developed about exposures at specific sites through site profiles and we continue to work with sites to optimize processes, the Department expects that it will be processing claims at a rate of 100 per week by August 31, 2003."²

To date, DOE has completed none of these exposure profiles. By comparison, NIOSH has issued six detailed site profiles, and will have another dozen profiles completed at DOE sites by year end. What explains DOE's failure to meet its commitment to develop these "exposure profiles?"

- DOE has stonewalled state compensation programs who offered to solve the willing payor problem. For example, Ohio proposed to become a willing payor for DOE a year ago. After DOE rejected this offer, the Ohio BWC Director wrote: "What troubles me more than the length of time it has taken DOE to respond is the lack of alternatives your staff has proposed to help get this program off the ground." (Attachment "A")*
- To our knowledge, none of the claims approved by the Physicians Panels have been paid yet. DOE has no system to track whether such claims have been filed with the state or their payment status.
- In FY 04 DOE has proposed a 368% budget increase to \$59 million this year; however, DOE has not committed to meaningful progress. OMB will only require DOE to process 25% of 15,000 claims (not to exceed 3,750) up to the doorstep of Physicians Panel (not through it) in the next six months.³ This OMB commitment is inconsequential, because in six months DOE will have almost the same size backlog as it has today—due to an average of 571 new claims being filed each month.⁴
- The *FY 02 President's Management's Agenda* calls for imposing consequences on failing programs. It states: "Underperforming agencies are sometimes given incentives to improve, but rarely face consequences for persistent failure. The all-carrot-no-stick approach is unlikely to elicit improvement from troubled organizations." Rather than overhauling a failing program, the Administration is rewarding failure by providing DOE with increased funding while blocking Congressional reforms to improve performance.⁵

²Response to written question 3(a) from U.S. Representative Ed Whitfield to Deputy Secretary McSarrow, at a March 2003 House Energy & Commerce Committee hearing.

*The attachments have been retained in committee files.

³Letter from Joshua B. Bolten, Director of OMB to Senator Charles E. Grassley, November 6, 2003.

⁴GAO Briefing on Preliminary Findings for Staff of Honorable Pete V. Domenici, Chairman, Committee on Energy & Natural Resources, U.S. Senate, October 10, 2003, pp. 16.

⁵The President's FY 02 Management Agenda states: "Many agencies and programs lack rigorous data or evaluations to show they work. Such evidence should be a pre-requisite to contin-

- DOE has failed to meet its commitments to improve the rate of claims processing so far. It has stonewalled efforts to find a willing payor, even when one is handed to them on a platter by Ohio. How many more times will DOE be allowed to underperform?

II. DOE IS ON A SLOW LEARNING CURVE, AND ITS OWN CONSULTANTS HAVE IDENTIFIED DESIGN FLAWS IN ITS CLAIMS DEVELOPMENT PROCESS

First, DOE's own consultants indicated that this program suffers from "design flaws" DOE could be "triaging" its cases into groups that could be moved efficiently. DOE could be setting up "super panels" for common conditions and common illnesses. Some of these include claims evaluated and approved by DOL. Others come with easily rendered diagnoses.

Second, as we look back, DOE wasted its Physicians Panels' scarce time by failing to prepare concise case summaries of medical facts and evidence. Extracting the relevant medical information into summaries is a staple of compensation programs in order to make it more efficient for doctors to decide claims. Of course, full documentation should be referenced and attached.⁶ We have interviewed participating physicians. Until recently, DOE has been giving doctors hundreds and hundreds of pages of documents to review. Even today, DOE is overloading doctors with paper for simple beryllium sensitivity cases that require a few pages of medical information. Some doctors have reported disorganized files, with duplicates that must be sorted out, wasting valuable time. DOE is now refining its approach, but only as a result of a process of trial and error that comes from learning on the job.

Third, DOE wasted the time of Physicians Panels by sending them claims for cases that had already been approved in state worker compensation systems!

Fourth, DOE abandoned Notice 350.6, which directs contractors not to contest state claims if a physician in the DOE's Former Worker Medical Screening Program diagnosed a work-related illness.⁷ Notice 350.6 expired in January 2002.⁸ DOE could have reduced the backlog of claims sent to the Physicians Panel, if it had renewed and updated this Notice. Its failure to do so is inexplicable.

Fifth, DOE ignored the February 26, 1998 directive issued by former Deputy Secretary of Energy Elizabeth Moeller, which barred contractors from contesting diagnoses of chronic beryllium disease in state worker compensation proceedings (Attachment "A"). Despite the availability of a tool to streamline its case load, DOE insists on processing beryllium disease claims through its Physicians Panels, including those already approved by the Department of Labor. Why is DOE clogging up its panels with cases that could be readily disposed of through this directive?

Sixth, DOE has failed to train its physicians on the requirements in the Physicians Panel regulations (10 CFR 852), and has not provided clear guidance on the proper "standard of causation" to use when evaluating cases. In one case, this misleading guidance forced an appeal for a former Rocky Flats worker. The Office of Hearings and Appeals vacated the decision and remanded it back to a physicians panel to re-review the case and apply the proper standard of causation.⁹ This was a waste of resources.

III. LEGAL CONSEQUENCES OF DOE'S POOR PERFORMANCE

These delays have adverse legal and human consequences. While claimants are waiting for cases to go through the Office of Worker Advocacy, the statutes of limitations have been expiring in certain states. Lawyers in Ohio have advised claimants to stay away from the DOE "assistance" program because they have no assurance that the DOE's physicians panel will reach a decision before the statutes of limitations runs out under Ohio's state workers' compensation program. An Oak Ridge attorney contacted DOE for assistance when his client was denied the right to file in Tennessee because the statutes of limitations ran out while his claim was awaiting review by DOE's Office of Worker Advocacy. DOE was asked to change its policies so that the DOE's contractors would agree to "toll" statutes of limitations if a case was taking longer than the statutes of limitations in Tennessee and there was an

ued funding." Even though DOE cannot demonstrate that any part of its program works, OMB blocked reforms proposed in the Grassley-Murkowski Amendment to move this program to DOL.

⁶In the Fernald II Settlement, detailed case summaries were prepared for the 3 doctor panels in neatly tabulated binders. DOE could have simply replicated this process.

⁷The DOE Former Worker Medical Screening Program provides medical screening for occupational illnesses that may have been caused by exposure to radiation or toxic substances at DOE defense nuclear facilities. It was authorized pursuant to Section 3162 of the FY 93 Defense Authorization Act (42 USC 7274(i)).

⁸<http://www.directives.doe.gov/cgi-bin/explhcgi?qry1988382291;doe-526>.

⁹Case Number TIA-0025 (June 30, 2003)

adverse Physicians Panel outcome. Despite a reasonable request from the worker's attorney, DOE refused to change its policy. The worker has lost his right to file with state, and as a consequence, DOE's delays have compromised the rights of this and many other claimants.

IV. DOE CONTRACTORS' ROLE IN CLAIMS VALUATION MUST BE DEFINED OR CLAIMANTS WILL FIND THEMSELVES ENMESHED IN LITIGATION

DOE has yet to define what posture contractors should adopt in resolving disputes over claims valuation. One area which is commonly disputed is the "degree of disability" (e.g., partial vs total disability) and this disability finding impacts the size of the payment.

How should claims valuation issues be resolved? Most state worker compensation programs have an adversarial "claims valuation" process. Subtitle D mixes a non-adversarial "causation" finding with a potentially adversarial state "claims valuation" process. Should DOE contractors be allowed an unlimited right to litigate disability claims with which they disagree? If DOE uses a Third Party Administrator to pay claims, how will disputes over the value of a claim be resolved? What role will the Office of Worker Advocacy take in guiding the contractors' posture to guide settlements?

To harmonize this program, the dispute resolution process should be non-adversarial at every stage, such as the one used by the Department of Labor under EEOICPA Subtitle B.

V. THE FORTHCOMING PHYSICIANS PANEL BOTTLENECK CAN BE MITIGATED WITH SEVERAL KEY REFORMS

In the future there will be a bottleneck at the Physicians Panels absent some reforms. To date 123 physicians have been appointed to DOE's Physicians Panels by NIOSH. Physicians are selected by NIOSH—instead of the DOE in order to provide a measure of independence. The first doctors were appointed in July 2001. It is expected that another 37 will be appointed this month. At least six physicians have withdrawn since the commencement of the program.

- Congress must eliminate the statutory cap of \$60 per hour to pay doctors who serve on a Physicians Panel.¹⁰ Physicians with a clinical practice cannot afford to take these cases without incurring a loss. This problem was identified by DOE staff and the DOE Advisory Committee more than a year ago, but DOE has proposed no solutions. Both the Reform of Energy Workers Compensation Act (H.R. 1758),¹¹ and the Grassley-Murkowski amendment to the FY 04 Energy and Water Appropriations Act, as amended, offered solutions. Although eliminating or raising the cap will attract a number of physicians with clinical practices who presently cannot afford to serve on Physicians Panels, it is by no means a silver bullet for what ails the program.
- A properly prepared case summary will allow more efficient use of physicians by reducing the physician-hours per case.
- Physicians Panels could use two physicians and only call in a third when a tie breaker is needed. This would mathematically increase the availability of doctors.
- Reinstatement of DOE Order 350.6 will make the physicians in the DOE former worker medical screening program more widely available.

The physician shortage does not explain DOE's backlog today, but this issue is looming on the horizon as a matter requiring Congressional action.

VI. DOE HAS ABOLISHED ITS ADVISORY COMMITTEE AND IGNORED EXPERT ADVICE

DOE has ignored, or only slowly accepted, the expert advice provided by the Worker Advocacy Advisory Committee (WAAC). On January 1, 2003, DOE allowed the charter of this Federal Advisory Committee to expire and has not reconstituted it, despite promises to members of Congress and the public.

What explains DOE's abolition of its expert advisory committee? Was the glare of public oversight too uncomfortable? Clearly, this expert Advisory Committee had

¹⁰ 42 U.S.C. 7385o(d)(2)(B) states: "Each member of a panel shall be paid at the rate of pay payable for level III of the Executive Schedule for each day (including travel time) the member is engaged in the work of a panel."

¹¹ H.R. 1758 raises the cap to approximately \$100 per hour. The Grassley-Murkowski amendment deleted the statutory cap and allowed DOL to set the physicians compensation levels, as they do in all of their other compensation programs.

not outlived its utility if it was attached to an agency that wanted to receive its advice.

VII. DOE'S USE OF AN UNDERQUALIFIED CONTRACTOR COUPLED WITH DOE'S LACK OF INSTITUTIONAL EXPERTISE HAS LED TO A POORLY PERFORMING PROGRAM

On November 21, 2001, DOE entered into a Memorandum of Agreement ("MOA") with the Navy's Space and Naval Warfare Information Technology Center ("SPAWAR") to provide the services of a support service contractor, Science and Engineering Associates ("SEA"), to the DOE.¹² SEA provides all of the manpower for running the claims development under Subtitle D. FY 04 projected revenues exceed \$30 million, compared with \$15.8 million in FY 02 and 03.¹³

Nothing on SPAWAR's website states that it has any subject area expertise in worker compensation issues. Similarly, nothing SEA's resume indicates any specific expertise in worker compensation claims processing.

There are government agencies, particularly the DOL, which specialize in worker compensation programs, but the Navy's SPAWAR is not among them. Similarly, there are firms which specialize in worker compensation claims processing, but SEA is not amongst them. DOE has not demonstrated, nor can it, that only SEA was qualified. What logic led DOE to enter into a MOA with the Navy, instead of the DOL?

While DOE purports to have entered into the MOA under the authority of the Economy Act, that law requires DOE to issue a "Determination & Finding" that, among other things, the services are not economically available to DOE by DOE contracting directly with a private entity through full and open competition (see: 48 CFR 17.503). Agencies are forbidden to use interagency acquisition as a mean of avoiding full and open competition.¹⁴ DOE has not made this certification public, despite requests from Congress. It will be interesting to learn how DOE could make such justification where SEA has no history of establishing worker compensation claims programs, while other firms offer such specialized expertise without a learning curve.

It also appears that DOE lacks the specialized expertise needed to assure that SEA's performance is adequately defined, supervised, and evaluated. Today, there are roughly six federal employees running DOE's program in the Office of Worker Advocacy ("OWA") who are overseeing approximately 70 SEA contractor employees. There is only one federal official in OWA who has a resume with previous worker compensation program experience, and they are not overseeing SEA. DOE's use of SEA may have been prudent, if SEA had the requisite expertise to set up an efficient program, or DOE had the expertise to direct the contractor. However, neither the GAO nor the Hays Company consulting report determined that DOE has established an efficient program. Indeed, we estimate that the administrative cost for developing each claim over the past year is approximately \$15,000.

VIII. DOE'S CLAIMS PROCESSING PROBLEMS ARE NOT OVERLY COMPLEX OR INSURMOUNTABLE IF THE AGENCY HAS THE COMMENSURATE SKILLS AND INFRASTRUCTURE

DOE would like Congress to believe that their poor performance relative to DOL is that it has an exhaustive records recovery task and medical evaluation process. This is true for a small percentage of cases, but significantly overstates the difficulty of their task.

Let's turn the question around: if Subtitle B claims had been given to DOE, would DOE have issued regulations, set up field offices, processed 95% of the 35,000+ claims received and issued payments of approximately \$700 million in the same time frame as the DOL?

Based on a DOE-DOL assessment several months ago which compared claimants using social security numbers, approximately 95% of the DOE's Subtitle D claims were also filed with the DOL. Subtitle C of EEOICPA allows claimants who qualify under Subtitle B to also file with state worker compensation programs for wage replacement if they are disabled. DOL has developed portions of those cases which overlap, and they are sharing these files with DOE.

First, roughly 80-85% of the DOE's cases can be handled without a major document recovery burden. Only ~15-20% of the DOE's cases will require extensive expo-

¹²The Space and Naval Warfare Systems Command Information Technology Center web site is <http://www.spawaritm.navy.mil>. This rapid growth in revenues from DOE explains SEA's opposition to transferring the program to DOL.

¹³Source: Response to written question 3(d) from U.S. Representative Ed Whitfield to Deputy Secretary McSlarrow, at a March 2003 House Energy & Commerce Committee hearing.

¹⁴*Government Contracts Reference Book*, Nash, Schooner, 1992, pp. 229.

sure assessments and research by DOE. Moreover, DOE says it has to dig into 50 years worth of contractor medical records. That is not needed. DOL relies upon the claimant's personal medical records.

Second approximately 60% of the overlapping cases also had medical conditions covered under Subtitle B, and thus DOL was required to fully develop the case. DOE can use DOL's case development, which makes their task relatively simple. DOE is wasting the time of Physicians Panels asking them to reconstruct radiation doses.

Third, approximately 30% of the overlapping claims do not have a covered condition under Subtitle B. With respect to these cases, over 1300 (>7%) claims involve "fingerprint" occupational diseases like asbestosis or silicosis, which are comparatively easy to diagnose and do not require extensive research.¹⁵ Another 1,100 cases (>6%) involve beryllium disease or beryllium sensitivity. These cases have already been developed by the DOL, and could have been processed *en masse* without having to dig out any additional medical or exposure records. Lacking a credible explanation for its performance, DOE is making a mountain out of a molehill.

IX. DOL CAN MOVE MUCH MORE QUICKLY THAN DOE IN PROCESSING CLAIMS BECAUSE IT HAS THE EXPERTISE, THE INFRASTRUCTURE AND THE EXPERIENCE

- DOL has the infrastructure. DOL has been handling worker compensation claims for 90 years through four programs including: the Federal Employee Compensation Act, the Longshore & Harbor Workers Act, the Black Lung Benefits Program and EEOICPA Subtitle B. DOL has 200 trained EEOICP claims examiners at four offices ready to start work as soon as they are assigned. DOE will face delays in ramping up its program because SEA (its contractor) has to hire 140 claims processing staff and train them.
- Three years have passed and DOE is still trying to design a functional claims processing system. Hay Company had identified "design flaws" in DOE's case processing systems.
- By contrast, DOL established a credible claims program in a matter of months, not years.
- Splitting responsibility between DOL and DOE has not resulted in a loss of accountability under Subtitle B, and would not do so if processing was shifted to DOL.
- Due to the 95% overlap between claims filed with DOE and DOL, DOL has already finished aspects of claims development, including employment verification and medical records evaluation. On day one, DOL would begin with a major head start over DOE, because they have already developed, in part, many of the DOE's languishing claims.

X. THE GRASSLEY-MURKOWSKI AMENDMENT WOULD HAVE REPAIRED THE FRONT END OF THE CLAIMS PROCESS BY TRANSFERRING CLAIMS PROCESSING AND PHYSICIANS PANEL RESPONSIBILITIES TO DEPARTMENT OF LABOR

The Grassley-Murkowski amendment, as amended, would have shifted claims processing and Physicians Panels from DOE to DOL. If adopted, it would:

- 1) provide authority for the Secretary of Labor to assume responsibility for claims processing, Physicians Panels, a non-adversarial appeals process, and development of information needed for physicians to make an informed decision;
- 2) require DOL to utilize DOE's existing Physician Panel regulations for up to 180 days until DOL promulgated interim regulations in order to prevent delay;
- 3) eliminate the cap on payments to physicians and allow DOL to set the rate for physician panels;
- 4) require DOL to maintain the DOE's existing standard of causation, protect against conflict of interest, require a simple majority for a panel determination and assist claimants if added medical information is needed by the Physicians Panel;
- 5) authorize use of the DOE former worker medical screening programs to assist in the development of exposure assessments and medical determinations;
- 6) require DOE to transfer records to DOL; and
- 7) transfer \$35 million from DOE to DOL for FY 04.

¹⁵Source: GAO Briefing on Preliminary Findings for Staff of Honorable Pete V. Domenici, Chairman, Committee on Energy and Natural Resources, United States Senate, October 10, 2003, pp. 16.

This approach enjoyed bipartisan support from certain Senators in states where 85% of the claims have been filed so far, and should be reconsidered as part of a reform proposal.

XI. DOE AND SEA'S OPPOSITION TO DOL TAKING OVER THE CLAIMS PROGRAMS ARE BEDROCKED ON UNSUPPORTED CONTENTIONS

DOE and its contractor SEA opposed the Grassley-Murkowski Amendment, saying it would lead to added delays. DOE argued that if it received the \$59 million it asked for in FY04 it would process 100% of its backlog of nearly 20,000 claims. However, when pinned down for a hard commitment, OMB would only commit DOE to processing more than 3,750 claims out of its backlog in 6 months. Not all 20,000 in the next year.

The reason for the delay: SEA cannot accelerate processing of claims because it faces delays related to hiring and training 140 staff. By contrast, DOL doesn't face this steep ramping up process; it hits the ground running much faster.

DOE/SEA maintain that delays from additional hiring and training are acceptable, but potential delays in transferring the program to DOL are objectionable and unacceptable. DOE's double standard is not supportable.

After the Grassley-Murkowski Amendment was stripped from the Energy and Water bill, we now learn that DOE is not willing to honor its previous claims development targets of finishing 100% of its claims backlog in 12 months with funding.

SEA's lobbyists assert that it is unfair to compare SEA's performance with DOL's, because DOL runs a simple "pay/no pay" system. This is inaccurate and misleading.

DOL performs detailed medical determinations to verify medical conditions under Subtitle B in order to comply with the EEOICPA criteria for determining causation. For claims involving beryllium disease or silicosis, the Act established medical criteria that must be met in order for a claimant to establish a covered disease.

Each cancer must be verified and the location of the primary cancer must be determined. DOL claims examiners must review the medical evidence in the file, evaluate the results of medical tests, and determine if the case meets the criteria of the Act, regardless of the presence or absence of a specific diagnosis. DOL has had to develop numerous policies and a significant expertise to accomplish these very complex adjudications. Additionally, DOL must determine which medical conditions are "consequential illnesses" in order to determine what medical costs the government is responsible for.

XII. DOL IS MORE COST EFFECTIVE

DOL's requirement for FY 04 to run this program is \$35 million, far less than the DOE's requests for appropriations and fund reprogramming of \$59 million. DOL has one of the lowest overhead rates for its worker compensation claims programs in the country.

XIII. REFORMS ARE URGENTLY NEEDED TO ASSURE THAT VALID CLAIMS HAVE "WILLING PAYOR"

Once a Physicians' Panel issues a positive determination, DOE is required to provide the claimant with "assistance" in filing their claim with a state workers' compensation commission. Pursuant to Subtitle D of EEOICPA, DOE must direct contractors not to contest the state workers' compensation claims, to the extent allowable by law, and DOE may not reimburse contractors for legal costs of contesting such claims.

However, this doesn't necessarily mean that the claim will be paid. Although DOE's prime contractors can be directed to pay claims, some "payors" are not under DOE's control and are unwilling to pay (e.g., prime contractors participating in exclusive state funds and contractors who have a policy with a worker compensation insurance company). Moreover, DOE's recent state agreements appear to allow contractors to contest the valuation of claims. Finally, no specific source of funds has been identified for paying such additional claims, other than the appropriations provided by DOE for its contractors personnel accounts.

Today, there are no state commissions or insurance companies who have agreed to be bound by DOE Physician Panel determinations. Although DOE entered into Memorandum of Agreements (MOA) with 14 states (AK, CA, CO, ID, IA, KY, MI, NM, NV, OH, SC, TN, TX, MT), none of these agreements require states to accept the findings of a Physicians' Panel. All 14 states reserve the right to impose their own provisions of state law rather than abide by the findings of DOE or its Physicians' Panel.

For example, the DOE-Alaska Commission Agreement of 9/13/02 is typical of the boilerplate language used in these agreements:

“A positive determination pursuant to Part 852 [DOE’s Rule] has no effect on the scope of State worker compensation proceedings, the conditions for compensation, or the rights and obligations of the participants in the proceeding; provided that consistent with Subtitle D, such a determination will prevent DOE and may prevent a DOE contractor from contesting an applicant workers compensation claim, and DOE may agree to indemnify a DOE contractor/insurer for State of Alaska workers compensation claims.”

Claims payment hinges on whether DOE’s current site contractors are self-insured for workers’ compensation to pay the claims. These contractors will then be reimbursed by DOE from appropriated funds. However, not all DOE contractors are self-insured. DOE has not identified a “willing payor” in IA, OH, KY, AK, MO and NV (prior to 1993). Moreover, large groups of workers subcontractor employees, construction workers, security guard forces—across all DOE sites have no “willing payor” because their employers frequently purchased worker compensation insurance. A “willing payor” is an entity which DOE can meaningfully direct to pay claims after a Physicians Panel determines that a claim is work related.

DOE HAS NOT DEFINED THE SIZE OF THE “WILLING PAYOR” PROBLEM

In 2002, DOE’s General Counsel verbally indicated that up to 50% of valid claims may not have a “willing payor”. Nine Members of the House Energy & Commerce Committee in March 2002 asked DOE to assemble a list of locations where it had self-insured contractors and where it lacked a “willing payor.” On June 7, 2002 DOE stated, “We are currently compiling, updating and confirming for accuracy this information. We will provide it to the Committee as soon as possible.”¹⁶ No such information was ever produced.

In March 2003, U.S. Representative Ed Whitfield again asked DOE which locations had a willing payor and which locations didn’t. DOE responded:

EEOICPA did not confer on DOE any authority to identify or seek “willing payors.” It simply directed DOE to exercise its contract administration authority with respect to its existing contractor in a manner that would encourage those contractors not to contest workers’ compensation claims filed by their employees who had received a favorable final determination from a DOE Physician Panel. DOE is so directing its current contractors.

This 2003 answer from DOE refuses to provide an analysis which, back in 2002, DOE said it would provide to the Energy & Commerce Committee “as soon as possible.”

GAO has indicated from a preliminary review of 9 sites that only 14% of the cases lack a willing payor. We believe this underestimates the problem, because GAO has run into obstacles trying to audit DOE’s data base to determine how many claims have a “willing payor.” For example, claims cannot be sorted by last employer, so the insurance status cannot be determined.

DOE’s former Worker Advocacy Advisory Committee (WAAC) warned the Secretary in August of 2001, and again in June of 2002, that the absence of a “willing payor” was a large, unresolved problem which would pose a “gross inequity” to claimants.

On June 27, 2002 WAAC Chairwoman Emily Spieler (Dean of the Northeastern University Law School) wrote on behalf of the Committee:

“WAAC Members thought that there was no legal impediment to payment of these claims by DOE. But we also think that if DOE is unwilling or unable to pay these claims, it’s absolutely essential for DOE to seek additional appropriations or support alternative legislative solutions that will result in payment of these claims without throwing them into the state workers’ compensation systems to be litigated. If the latter occurs, insurers and state funds will not be required to waive any technical or other defenses to these claims, and it is highly likely (after considerable administrative expense) that few, if any, of these claims will be paid.”

In response, Assistant Secretary Cook wrote (8/9/02):

“The issue of mechanisms of payment of claims where there is no current contractor with responsibility for paying a claims remains a concern. We will continue to explore possible remedies with the WAAC, the General Counsel and Congress to correct this inequity.”

¹⁶ June 7, 2002 letter from Beverly Cook, Assistant Secretary of Energy to U.S. Representative Ted Strickland, pp. 3.

Neither DOE nor the Administration has proposed solutions to this “inequity,” despite repeated requests from Governors, state worker compensation commissions and Congress.

In Alaska, DOE’s failure to identify a willing payor has created chaos for claimants. Sylvia Carllson was one of the first Alaskans to receive a positive Physicians Panel determination from the Office of Worker Advocacy (DOE). She is a widow/survivor. Her husband was a shaft miner on Project Cannikin at Amchitka Island from 1970 through 1971. He was exposed to ionizing radiation in the course of his employment for Kiewit-Centennial, a prime contractor of the Atomic Energy Commission. He died before his 41st birthday in 1979 of colon cancer. Ms. Carllson has detailed her situation in a November 5, 2003 memo, and I have included excerpts below:

Beverly Cook, DOE Assistant Secretary, in her April 16, 2003, letter to me suggested that I apply for workers compensation based on the positive and unanimous finding by the Physicians Panel. Her letter also stated that a cognizant contracting officer would notify the contractor to accept primary liability for my claim and would instruct the contractor not to raise affirmative defenses against my claim.

I filed a claim under the Alaska Workers Compensation system. Contrary to Secretary Cook’s letter to me, two different attorneys representing the contractor, Kiewit-Centennial and two different insurance carriers and adjusters have been aggressively, almost savagely contesting my claim.

Affirmative defenses raised by opposing attorneys include the following: 1) Is the Employer (Kiewit-Centennial) entitled to an offset to any amounts recovered by the Claimant (me) under the EEOICPA; and 2) Does the release (under Subtitle B) signed in the federal arena bar recovery under state workers’ compensation? Other actions taken by the opposing attorneys include:

a six-hour deposition with questions based primarily on my claims submitted to DOE under Subtitles B and D of the EEOICPA. I would characterize the entire deposition as insulting, intimidating and a waste of time and money.

demands for volumes of documentation relating to my claims under Subtitles B and D of the EEOICPA; for medical information; Social Security applications and personal information regarding my husband. The cost of reproducing documents for two different law firms, the contractor, adjusters and the Alaska Workers Compensation Board has amounted to over several hundred dollars.

attending pre-hearings and hearings scheduled by the Alaska Workers Compensation Board. Although I am now represented by an attorney, I am participating fully in the defense of my claim.

The merits of my case were originally scheduled to be heard before the Alaska Workers Compensation Board November 4, 2003. Opposing attorneys have begun petitioning the AWCB for continuances. So far, opposing attorneys have been successful in obtaining two continuances. I expect this practice of petitioning for stays to continue. My case may be heard sometime in 2004 if I’m lucky.

Opposing attorneys in my case have led the effort in Alaska of requesting that all insurance companies involved in the Amchitka cases pool their resources in order to retain medical experts to counter the Subtitle D determination. Fred Mettler, Jr., MD, MPH, Professor Emeritus with the University of New Mexico Department of Radiology and John R. Frazier, PhD, CHP with Auxier and Associates have been retained to assist opposing attorneys in defeating my claim. Incidentally, John R. Frazier is senior analyst with a firm that has been contracted to produce site profiles for NIOSH under the EEOICPA, a definite conflict of interest in my opinion. It is my understanding that both Drs. Mettler and Frazier are being compensated to testify against my claim at the rate of one thousand dollars per hour.

DOE has pointed out that they were successful in negotiating a Memorandum of Understanding with the State of Alaska which allowed them to accept my Subtitle D application. The MOU is meaningless. No one in the Alaska Workers Compensation office in Anchorage or in Juneau understands the significance of the MOU. It neither helped nor hindered my workers’ compensation claim.

Had DOE fulfilled its obligations under the EEOICPA, I would not have been put in the position of defending my claim under the Alaska Workers Compensation system. Had DOE addressed the “willing payor” issue, the matter of adjudicating my claim under the AWCB would have been unnecessary. DOE has

steadfastly refused to even respond to inquiries about the Willing Payer issue.¹⁷ Governor Frank Murkowski, who worked with a bipartisan congress to pass the EEOICPA, called upon Secretary Abraham to find a solution to the Willing Payer issue. Governor Murkowski's May 2003 letter is to this day unanswered. U. S. Senator Lisa Murkowski and Congressman Don Young from Alaska have both asked Secretary Abraham to resolve the willing payor issue, without success. It appears to me that Secretary Abraham and his staff have taken the term "stonewalling" to new heights on the issue of finding a willing payor. My question is why has the Department of Energy been allowed to continue its miserable performance of implementing Subtitle D of the EEOICPA.

I am respectfully requesting that this Committee recognize that DOE is simply unable and unwilling to fulfill the obligations it was charged with under the EEOICPA. If DOE cannot answer why it is unwilling or unable to meet the responsibilities it has to Subtitle D applicants, then it should at the very least step aside so that another agency can complete the job.

Ms. Carllson is encountering precisely what the Advisory Committee warned against. In three years, DOE has taken no meaningful steps to resolve the willing payor problem. DOE officials blame this on Congress and a poorly crafted statute. But, DOE has proposed no credible solutions, and rejected responsible bi-partisan legislative reforms such the Reform of Energy Workers Compensation Act (H.R. 1758), whereby the DOL could serve as the Third Party Administrator to pay all claims using a benefit level set under the Federal Employee Compensation Act (5 U.S.C. 8101 et seq).

Further, DOE will not intervene in the Alaska proceeding to defend its own Physicians Panel determination in Alaska. Precisely what "assistance" is DOE providing in the Carllson case, if it cannot provide a willing payor and won't even defend its own Physician Panel decisions?

One proposal is for DOE to retain a non-risk bearing Third Party Administrator. In Colorado, DOE's contractor, Kaiser-Hill, is required to contest valid worker compensation claims as a result of a \$1 million "top layer" insurance policy. Kaiser-Hill has reportedly entered into an arrangement with Pinnocol Insurance to serve as a Third Party Administrator to pay valid occupational illness claims. According to the State of Colorado, authority to proceed to pay claims has not been granted due to the absence of a waiver from the predecessor contractors and most importantly—an assured source of funding to cover multi-year obligations. This proposed agreement has not been made public and should be.

XIV. PHYSICIANS WILL BE DRIVEN OUT OF THE PROGRAM WITHOUT A WILLING PAYOR

Physicians have been subpoenaed in this Alaska worker compensation case, and subjected to interrogatories. Allowing physicians to be enmeshed in litigation will eventually drive some out of the program at a time when the program has a shortage of physicians. The physicians are in no position to be summoned to Alaska, nor has DOE committed to cover such costs in connection with defending Physicians Panels determinations.

XV. RECOMMENDED SOLUTION TO FIX SUBTITLE D

DOL should be assigned the primary responsibility to administer the program for compensating DOE contractor employees made ill from exposure to toxic substances at Department of Energy facilities, including: (a) the processing and evaluation of claims; (b) the management of Physicians Panels; (c) and serving as the payor for such claims.

DOL would evaluate disability claims and use the Federal Employee Compensation Act (FECA) as the template for setting benefit payment levels. DOL would use its existing EEOICPA staff now used for Subtitle B claims, inasmuch as the DOL has worked off its backlog. Benefits could be funded with discretionary appropriations whereby DOE would reimburse DOL for the cost of benefits, similar to the model in place today for FECA. Alternatively benefits could be appropriated through direct spending to the EEOICPA Fund at the DOL. Subtitle B is funded through direct spending. The Reform of Energy Workers Compensation Act (H.R. 1758) establishes DOL as the willing payor using this model.

Under this reform, DOE would be tasked with providing individual employment and workplace information necessary to the Secretary of Labor. DOE would be relieved of funding its self-insured contractors with discretionary appropriations to pay approved claims.

¹⁷ See Attachment "C"

We recommend that either NIOSH and/or DOE former worker medical screening programs be tasked to provide exposure assessments for each of the major Department of Energy sites. Further NIOSH should continue to appoint Physician Panels, and should assist DOL in developing diagnostic presumptions, where possible, for illnesses related to exposure to toxic substances.

Moving Subtitle D, including claims payment functions, to DOL makes sense because: 1) it simplifies public understanding by providing 1-stop shopping for claimants; 2) DOL has the expertise and infrastructure to implement the entire program, including claims processing and claims valuation; 3) DOL has credibility because it has met its previous commitments, and (4) DOL has demonstrated that it can start up work with minimal delays.

Outlined below is a comparison of options to reform Subtitle D:

Function	Current Law	H.R. 1758	Proposed Reform
Records Recovery	DOE	DOE	DOE
Claims Processing	DOE	DOE	DOL
Physician Panel/Causation	DOE	DOE	DOL
Appeals of Panel	DOE	DOE	DOL
Determination of Disability	State	DOL	DOL
Determination of Amount \$	State	DOL	DOL
Appeals of Disability/\$	State	DOL	DOL
Payment of Claim	50-75% DOE contractor 25-50% no payor	DOL DOL	DOL DOL

XVI. SUMMARY

The DOE's program has 3 key elements, all of which are in need of reform none of which DOE seems capable or inclined to fix. No matter how well intentioned, DOE's failure to make a meaningful dent in its backlog or move more than a handful of claims over the past three years speaks for itself. Claimants need a willing payor, not litigation headaches. Doctors may be driven away from the program if they are unwittingly ensnared in litigation that they never intended to join.

Sick workers do not have time for DOE to learn on the job, nor can they withstand the legal machinery awaiting them in states where there is no willing payor. So far the only winner has been a support service contractor generating healthy revenue gains, which has fought reforms in order to maintain the status quo. It is time to give this job to those who have the skills and infrastructure to perform. It is time for the public interest to prevail.

It makes no more sense for Congress to assign DOE a worker compensation program than it does to assign a nuclear weapons program to the Department of Labor (DOL). By adopting comprehensive reforms which shifts this program to the DOL, Congress can honor its commitment to cold war veterans who have been put at needless risk and harmed by DOE, its predecessor agencies, and their contractors.

Senator BUNNING. Thank you, sir.

Mr. Donald Elisburg.

STATEMENT OF DONALD ELISBURG, ATTORNEY, ON BEHALF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AND THE BUILDING CONSTRUCTION TRADES DEPARTMENT (BCTD)

Mr. ELISBURG. Thank you, Mr. Chairman. If I may offer our full statement for the record.

Senator BUNNING. Absolutely, without objection.

Mr. ELISBURG. I appreciate the opportunity to appear here. I will do my best to try to anchor this very distinguished group of colleagues here without being overly repetitious, because I think they have all really made the same points.

My name is Don Elisburg. I am appearing today on behalf of the AFL-CIO and the Building and Construction Trades Department. I have been asked to testify because of my prior experience in implementing similar compensation programs in the past. I testified in support of the legislation that ultimately became EEOICPA be-

fore the Congress, specifically in support of assigning this program to the Secretary of Labor when this law was under consideration. I was also a member of the Workers Advisory Committee at the Department of Energy from January through December 2002.

[Room lights flicker.]

Senator BUNNING. Hold on just a second. Let us see if we can correct our problem.

[Pause.]

Senator BUNNING. Voila. Go ahead. Thank you.

Mr. ELISBURG. Obviously, the point of our appearing here is that the AFL-CIO and its affiliate members have a significant interest in the implementation of this program. They have been involved since the weapons program began as the Manhattan Project in the early 1940's, when the members of the affiliates built and maintained the many facilities used to develop and maintain nuclear weapons. The members of the AFL-CIO and its affiliates have also served as the principal production and operating personnel of these weapons facilities.

For decades the AFL-CIO, the BCTD, the Metal Trades Department, PACE, the Laborers, and other unions have worked to secure safety and health rights and protections and just compensation for these workers.

Unfortunately, the experience with the implementation of this program is just not what the sick workers or their survivors deserve, nor does it meet the objectives Congress set forth in the act. Energy workers with radiation-induced cancers and toxic exposures need timely compensation and that is not happening with these many thousands of claimants, as has been stated over and over again today.

I would like to point out that our statement does deal with both subpart B and D. Subpart B is, for the record, relating to the dose reconstructions, but we do want to make clear that, despite the efforts of the Department of Labor in moving the claims along, the dose reconstruction that NIOSH is responsible for has also been set up for long delays and imperfect results, and basically that workers at places like Los Alamos, Savannah River, Rocky Flats are in the same situation as in the gaseous diffusion plants and Amchitka and that NIOSH should recognize that there are not sufficient records and information and simply put all of these workers in the special exposure cohorts with the same presumptions and benefits and move those claims along.

As to subtitle D, I have to agree with much of the testimony of my colleagues today. As currently interpreted, it cannot work. The Department of Energy is neither structured nor is interpreting the statute to make it work as it might have. It was for that reason that the AFL-CIO was supportive of the Grassley-Murkowski amendment as indeed the first step in at least trying to alleviate some of this claims-handling process.

Obviously, there are other issues that need to be dealt with, such as the willing payor and so forth. But it is very clear that the Department of Energy does not really have it. The statute is supposed to be interpreted to pay claimants. It was not devised to need another series of barriers and hurdles. The way in which the process is being interpreted turns Congress and its direction on its head.

The concept was to determine the causation and then arrange through the State compensation system to have the claim paid by the contractor. The notion that you would spend a couple of years determining causation and then send them in for another couple of years to relitigate makes no sense and is simply denying claimants the relief that the Government admitted they owed.

Certainly, when the Secretary of Energy signs off on a claim, they expect to pay. We cannot see how they have interpreted the relationships to simply say, yes, we will take you and your files and dump you on the doorstep of the agency, and you figure out how to get our contractor to pay money that we will then reimburse them anyway, because in the end it is all DOE money.

I would also want to tell you personally that I do agree with the statements pretty much of Professor Burton and Richard Miller as to the sort of aggregate problems here and how they could be improved.

I would like to—I know my time is up—sort of in conclusion say that as a member of the advisory committee we asked many of these questions. We told them from the beginning that the first in, first out probably made no sense, that they needed to move some claims that could be paid so they could see how the process would work.

We raised the issue of willing payor over and over again. Aside from the documentation you have seen, we personally talked to Secretary Cook each meeting and we asked about the willing payor, should we turn the lobbyists loose on Congress, should we write a letter saying that something should be done? And each time we were told: No, we think we have a way out, we think there is a way to pay them, we think there is a way to do this; it is not necessary, etcetera, including, I might say to Leon, the gaseous diffusion plant at Paducah, which was specifically raised.

I was somewhat surprised to hear the Department of Energy say, well, we sort of dumped it and we are not paying any attention to it.

Finally, in the 2 years of the advisory committee activity I frankly never heard them raise the question that they did not have enough money to do their job. In addition, the questions I have not heard are, in addition to the question of the willing payor and those contractors they cannot find out there, at least half of these claims or more are going to be contractors where they know who they are and they will reimburse them, and those still are not moving forward to be paid.

In short, Mr. Chairman, we think that this program has simply not met the points that Congress asked them to meet.

[The prepared statement of Mr. Elisburg follows:]

PREPARED STATEMENT OF DONALD ELISBURG, ATTORNEY, AFL-CIO,
BUILDING & CONSTRUCTION TRADES DEPARTMENT

Mr. Chairman and Members of the Committee: My name is Donald Elisburg and I am appearing today on behalf of the AFL-CIO and the Building Construction Trades Department (BCTD). I have been asked to testify because of my prior experience implementing similar compensation programs in the past. I testified in support of the legislation that ultimately became EEOIPCA before the Congress, specifically in support of assigning this program to the Secretary of Labor when this law was under consideration. I was also a member of the Workers Advocacy Advisory Committee of the Department of Energy from January 2001 through December 2002.

That Advisory Committee was appointed to assist the Department of Energy in implementing its responsibilities under EEOICPA.

I want to thank you for the opportunity to testify on the implementation of the EEOICPA.

The AFL-CIO and our affiliates have a significant interest in the implementation of this program because our involvement since the nuclear weapons program began as the Manhattan Project in the early 1940's when members of our affiliate unions built, and maintained the many facilities used to develop and maintain nuclear weapons. Our members have also served as the principal production and operating personnel of these weapons facilities. For decades, the AFL-CIO, the Building and Construction Trades Department, Metal Trades Department, PACE, the Laborers and other unions have worked to secure safety and health rights and protections and just compensation for these workers.

As we have testified before Congress many times, these workers were engaged and continue to be engaged in activities vital to the security of the United States. They deserve to be treated with fairness and dignity.

EEOICPA was passed in recognition of the fact that the work at these facilities put workers at risk of injury, illness and death from exposure to radiation and various toxic chemicals and materials used in the nuclear weapons program. Secrecy put these workers at additional risk. EEOICPA was Congress' recognition and determination to compensate workers and their families even if it would not make them whole.

Congress directed the President to implement this program. By Executive Order the program was assigned to the Departments of Energy, Labor and HHS.

Unfortunately, the experience with the implementation of this program is just not what these sick workers or their survivors deserve, nor does it meet the objectives Congress set forth in the Act. Energy workers with radiation-induced cancers need timely compensation and that is not happening with many thousands of claimants. Problems exist with both Subpart B—administered by DOL and NIOSH—and with Subpart D—administered by DOE.

SUBTITLE B ISSUES

Subtitle B of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), 42 U.S.C. §§ 7384-7385, enacted in 2000, established a federal program to compensate workers at Department of Energy atomic weapons and contractor facilities for illnesses resulting from radiation, beryllium, and silica. The program provides a \$150,000 lump sum payment and prospective medical benefits to covered employees or a lump sum payment to their survivors. To date, the Department of Labor has paid over \$672 million in benefits. But there is a huge backlog of claims pending—more than 14,000—awaiting dose reconstruction by the National Institute for Occupational Safety & Health (NIOSH). Claims of workers with cancer who are awaiting payment because NIOSH has not completed their dose reconstruction arise in states throughout the country.

NIOSH should streamline the procedures for evaluating these claims so workers and their survivors can be compensated in a timely manner as Congress intended. The fairest and most efficient way to do this is to streamline the procedures to add groups of workers to the Special Exposure Cohort so their claims can be considered on an expedited basis.

RADIATION DOSE RECONSTRUCTION AND SPECIAL EXPOSURE COHORTS UNDER EEOICPA

When EEOICPA was passed, the Congress designated certain groups of workers with cancers linked to radiation exposure to be included in a special exposure cohort (SEC) because DOE's radiation exposure records were so poor it was not possible accurately to reconstruct each employee's radiation dose. Under the Act, workers employed at DOE gaseous diffusion plants in Oak Ridge, Tennessee, Paducah, Kentucky or Portsmouth, Ohio were automatically included in the SEC. Also, workers involved in testing activities on Amchitka Island, Alaska were designated as SEC members. For these employees, compensation is paid without regard to an employee's individual radiation dose if the claimant has one of the designated cancers and meets the Act's general exposure/employment criteria. These claimants receive compensation for cancer promptly.

But for workers with cancer from all other DOE facilities, or for those with cancers other than those specified as presumptively linked to radiation exposure, different, complicated procedures were established—requiring either individual dose reconstruction or a lengthy process to designate additional members of the SEC. NIOSH has been given responsibility for both of these activities, but because of the complexities involved, has fallen years behind. More than 14,400 claims are now

pending dose reconstruction and no new members have been added to the SEC. So far, NIOSH has forwarded completed dose reconstructions to DOL for only about 700 claims. At the rate NIOSH is going, it will be years before these backlogged claims are processed and victims receive compensation. Meanwhile, DOE workers with cancer do not have the medical or cash benefits Congress provided and their widows grow old without the economic security to which they are entitled.

BACKLOG OF PENDING CLAIMS AT NIOSH AWAITING DOSE RECONSTRUCTION

The backlog of pending claims at NIOSH is a problem that affects workers throughout the country and is particularly severe at some of the larger DOE weapons facilities where large numbers of workers were exposed to radiation. These facilities including Rocky Flats (CO), Iowa Ordnance Plant (IA), Idaho National Lab (ID), Fernald (OH), Los Alamos (NM), Nevada Test Site (NV), Savannah River (SC), Oak Ridge National Lab (TN), and Hanford (WA). The table below shows the number of claims (and individual cases) from all Department of Energy facilities awaiting dose reconstruction at NIOSH by state (for states with more than 50 claims).

State	Claims Filed	Claims Accepted *	Pending at NIOSH
Alaska	286	106	64
California	1,594	145	810
Colorado	3,214	1,488	788
Florida	1,251	146	613
Idaho	1,097	56	652
Illinois	1,120	95	540
Iowa	1,079	30	599
Kentucky	3,523	844	775
Massachusetts	419	9	207
Michigan	233	16	102
Missouri	1,016	69	529
Nevada	1,680	142	815
New Jersey	132	10	56
New Mexico	3,577	1,225	642
New York	2,293	141	1,279
Ohio	2,854	709	1,008
South Carolina	2,458	42	1,516
Tennessee	7,208	1,506	3,143
Texas	1,234	129	601
Washington	2,388	107	1,669
West Virginia	508	34	90

*Accepted claims include claims for chronic beryllium disease, silicosis, as well as radiation cancer.

One of the major reasons for this delay is that for many workers DOE radiation exposure records are incomplete, inaccurate or nonexistent. When NIOSH reconstructs a radiation dose, it must make educated guesses as to what an employee's dose was likely to have been. While NIOSH claims that its process is employee friendly, nobody can gauge whether NIOSH dose reconstructions bear any reasonable relationship to an employee's actual radiation dose. We cannot state too strongly the need to be sure that this aspect of the program is transparent and credible to the claimants and their families.

As stated earlier, this entire compensation program has to be measured against the very long and well documented history of secrecy and deceit on the part of the Department of Energy and its predecessor agencies tracing back to the earliest days of the Manhattan Project. This long history and the resultant distrust of the DOE requires an open and transparent program. This is especially true given the technical complexity of dose reconstruction and the reliance on DOE to provide the dose data.

Many thousands of our members served their country in the cold war by working at these facilities often under very difficult conditions. They deserve to be treated with respect and should have a compensation program that they can trust and understand.

Unfortunately, some of the activities that NIOSH has undertaken appear to be at cross purposes with this goal of an open and transparent program. As an example, NIOSH has recently implemented a plan to develop site profiles for each major site as a framework for individual dose reconstructions. These profiles would include the major sources of exposure data for the site.

However, NIOSH's procedure included no opportunity for input into these site profiles by unions, interested parties, etc. until after the profiles were complete and being used by NIOSH. This procedure only compounds the past mistakes made by DOE to hide information from the exposed workers and their families. The Advisory Board raised objections to this approach and has asked NIOSH to develop a more open process involving the local unions and other interested parties in the development and review of these site profiles in order to ensure the credibility of the dose reconstruction program.

The Savannah River Site is a prime example. The site profile was released in August without any discussion or review with the local unions or other interested parties. NIOSH's initial excuse, that there were no unions at SRS, totally missed the fact that there have been union workers engaged in building and maintaining the SRS facility since the first construction activity a half century ago. We would note for the record, that after extensive protest, NIOSH finally conducted a meeting at SRS earlier this week to discuss this profile with the local unions and interested parties. These activities should not have to be undertaken only after claimant protests.

Similar concerns about the uncertainty of dose reconstruction have been raised about Department of Defense radiation dose estimates for military personnel. Unlike DOE nuclear workers, under veterans' compensation benefits, all veterans with specified cancers are presumed entitled to compensation. Dose reconstruction is used to determine whether to compensate veterans for other diseases. The National Academy of Science's Institute of Medicine recently evaluated the DOE dose reconstruction process. It concluded:

Because specific exposure conditions for any individual often are not well known, many participants did not wear film badges during all possible times of exposure, and the available survey data used to input the models often are sparse and highly variable, the resulting estimate of total dose from many participants are highly uncertain.

PROBLEMS WITH PROPOSED NIOSH SEC PROCEDURES

There are major problems with the proposed procedures for the designation of additional members the SEC. Under EEOICPA, additional members of the SEC may be designated when it is not feasible to estimate with sufficient accuracy the radiation dose of the affected workers. (Section 3626). This spring, NIOSH proposed procedures for designating additional members of the SEC. The NIOSH proposal was strongly criticized by the Advisory Committee on Radiation and representatives of DOE workers. Decisions on adding additional members to the SEC can be expected to take at least two more years—almost five years from the enactment of EEOICPA. Employees seeking designation as members of the SEC will have to meet a high burden of proof—a burden not imposed on fellow workers from gaseous diffusion plants who have already received compensation for their radiation induced cancers.

Workers at DOE facilities such as Hanford, Rocky Flats, and Savannah River, and other locations, are treated unfairly under EEOICPA. Their colleagues at gaseous diffusion plants, like veterans, are presumed eligible for compensation if they get certain cancers and many have received compensation. Meanwhile, these other workers, whose radiation doses likely were just as high and for whom radiation dose records are just as sparse, must individually demonstrate their right to compensation. The process for doing so, dose reconstruction, is too slow and inherently uncertain. Only a handful of workers outside the SEC have actually received compensation for their cancers since EEOICPA was passed.

STREAMLINING SEC PROCEDURES AND EXPEDITING COMPENSATION FOR VICTIMS

EEOICPA needs to be fixed so DOE workers with radiation induced cancers or their survivors receive timely compensation. The following modifications to the program would accomplish this goal by simplifying and streamlining the procedures for adding additional groups of workers or facilities to the special exposure cohort. NIOSH has the authority to implement each of these policies, but has so far failed to do so:

- Set deadlines for NIOSH to respond to petitions to add workers to the Special Exposure Cohort—providing 90 days for response and an additional 45 days where NIOSH requests review of the petition by the Advisory Committee on Radiation.
- Allow NIOSH to determine which petitions for adding groups to the SEC need to be reviewed by the Advisory Committee. (Currently all petitions, even those

pertaining to small groups of workers must be referred to the Advisory Committee.)

- Clarify that NIOSH may add a group of workers to the SEC if it determines that representative records of radiation doses for the individual are incomplete or missing and that radiation may have caused or contributed to specified cancers among members of the group. (These were the criteria that were used to designate workers at gaseous diffusion plants as members of the SEC in the original Act.) Currently, NIOSH attempts to reconstruct doses even if individual monitoring records are not available.
- Establish the same criteria for compensation for new groups of workers added to the SEC as those set for gaseous diffusion workers in the original Act.

These revised procedures will streamline the process for evaluating petitions for expanding the SEC, and for those groups of workers who are added, expedite the process for evaluating their individual claims for compensation. Once added to the SEC, the same criteria for compensation will apply to these workers as applies to workers at the gaseous diffusion plants. The recommended procedures do not expand the number of workers eligible for compensation, nor should it change the anticipated costs of the program. Most of these claimants are already eligible for compensation. They are just required to wait far too long to receive the compensation they are due. Streamlining the process and clarifying the criteria by which these employees may be added to the SEC simply changes the procedures by which the merits of their claims are judged and speeds up the compensation process.

Mr. Chairman, our organizations have a longstanding relationship with the Department of Labor and with NIOSH. We supported the assignment of this program to them. We believe that the Department of Labor has done a very commendable job so far in getting its program up and running. As the comments submitted by our respective organizations to NIOSH make clear, we believe that NIOSH is simply misreading its responsibilities under the existing law and has proposed a regulatory scheme that will not work and which will result in both a costly process and an intolerable wait by claimants for relief.

If NIOSH persists in interpreting the statute with such restrictive requirements, then, we see no alternative but to support changes to the law that will ensure equal treatment of all claimants under this program. Frankly, it would be appropriate for Congress to designate the former workers from the other major weapons sites as members of Special Exposure Cohorts and simply bring to an end this long, costly and dubious process of dose reconstruction as well as a complex and costly process to establish separate SEC's site by site. Workers at Los Alamos, Hanford, Rocky Flats and Savannah River, for example, should be treated the same under this Act as those from the Gaseous Diffusion Plants or Amchitka.

Mr. Chairman, I would like now to turn to other serious problems with EEOICPA, namely the Subtitle D program administered by the Department of Energy.

BACKGROUND ON SUBTITLE D OF EEOICPA

Subtitle D of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) was intended to take DOE out of the business of fighting state workers' compensation claims brought by sick nuclear workers who were employed at DOE defense nuclear sites. Benefits are provided for workplace-related disabilities and medical costs. In September 2002—almost two years after the enactment of EEOICPA—DOE issued a rule governing the operations of the Physicians' Panel (10 CFR Part 852). The rule established the criteria for Physician Panels to determine whether an illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance. That criteria is whether "exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." (See: 10 CFR Part 852.8).

A simple majority of a Panel (two of three doctors) must agree in order to issue a determination. The rule prohibits contractor involvement in contesting Physician Panel findings, but allows claimants to appeal adverse Physician Panel findings within the DOE's Office of Hearings and Appeals. A total of 26 appeals have been decided to date. DOE estimated benefits and administrative costs for this rule at \$130 million/10 years during the rulemaking. Physicians are selected by NIOSH—instead of the DOE—in order to provide a measure of independence. There are approximately 120 doctors who have been approved by NIOSH for the DOE Physicians Panel. Due to the low rates of compensation (\$55-60/hour), some physicians with clinical practices have withdrawn from participation. Once a Physicians' Panel issues a positive determination, DOE is required to provide the claimant with assistance in filing their claim with a state workers' compensation commission.

Pursuant to EEOICPA, DOE must direct contractors not to contest the state workers' compensation claims, to the extent allowable by law, and DOE may not reimburse contractors for legal costs of contesting such claims. Practically, this means DOE will instruct its contractors to send a letter to the state workers' compensation board indicating that they will not contest the claim. However, this doesn't necessarily mean that the claim will be paid, because some "payors" are not under DOE's/contractor's control and are unwilling to pay (e.g., exclusive state funds and insurers).

States and insurance companies are not agreeing to be bound by DOE Physician Panel determinations. Although DOE entered into Memorandum of Agreements (MOA) with 12 states (AK, CA, CO, ID, IA, KY, NM, NV, OH, SC, TN, TX) during 2002, none of these agreements require states to accept the findings of a Physicians' Panel. All 12 states reserve the right to impose their own provisions of state law rather than abide by the findings of DOE or its Physicians' Panel.

For example, the DOE-Alaska Commission Agreement of 9/13/02 says:

"A positive determination pursuant to Part 852 [DOE's Rule] has no effect on the scope of State worker compensation proceedings, the conditions for compensation, or the rights and obligations of the participants in the proceeding; provided that consistent with Subtitle D, such a determination will prevent DOE and may prevent a DOE contractor from contesting an applicant workers compensation claim, and DOE may agree to indemnify a DOE contractor/insurer for State of Alaska workers compensation claims."

To get valid claims paid, DOE is counting on its current site contractors, many of which are self-insured for workers' compensation, to pay the claims and the DOE will reimburse them (using appropriated funds). At a number of DOE sites in IA, OH, KY, AK and CO, the DOE has not identified a "willing payor." A "willing payor" is an entity which DOE can meaningfully direct to pay claims after a Physicians Panel determines that a claim is work related. DOE's General Counsel has indicated that up to 50% of valid claims may not have a "willing payor" but others within DOE have offered widely varying estimates of how many claims lack a willing payor. Nobody knows at which locations DOE lacks a willing payor. Indeed, DOE has not even surveyed its contracts to determine which ones contain successor liability clauses—and thus require the existing contractor to pay the claims of former contractors.

Congress can easily assure that these cases are paid promptly. DOE's Worker Advocacy Advisory Committee (WAAC) warned the Secretary in August of 2001, and again in June of 2002, that the absence of a willing payor was a large, unresolved problem which would pose a "gross inequity" to claimants (as we are witnessing today in Alaska).

On June 27, 2002 WAAC Chairwoman Emily Spieler (Dean of the Northeastern University Law School) wrote on behalf of the Committee:

"WAAC Members thought that there was no legal impediment to payment of these claims by DOE. But we also think that if DOE is unwilling or unable to pay these claims, it's absolutely essential for DOE to seek additional appropriations or support alternative legislative solutions that will result in payment of these claims without throwing them into the state workers' compensation systems to be litigated. If the latter occurs, insurers and state funds will not be required to waive any technical or other defenses to these claims, and it is highly likely (after considerable administrative expense) that few, if any, of these claims will be paid."

The Advisory Committee accurately described the problem that has now arisen in Alaska.

The Committee concluded:

These claims should be handled in the same manner as the claims of current contractors, through a central non-risk bearing third party administrator, with a source of payment designated by the Department.

In response to this recommendation, Assistant Secretary Cook wrote (8/9/02):

"The issue of mechanisms of payment of claims where there is no current contractor with responsibility for paying a claims remains a concern. We will continue to explore possible remedies with the WAAC, the General Counsel and Congress to correct this inequity."

DOE allowed the Advisory Committee's charter to expire 1/1/03. Neither DOE nor the Administration has proposed any solutions, despite repeated requests from Governors, workers' compensation commissions and Members of Congress.

DOE has received approximately 18,823 claims for assistance as of August 29, 2003. In the year since its rule has finalized, DOE has made very little progress on its backlog.

Only 74 (0.3%) have been decided by the Physicians Panel (45 accepted and 29 rejected) and 132 (0.6%) are in the Physicians Panel process. DOE has not even started case development work on 14,434 cases (71%). DOE estimates a backlog of 5 years. Others foresee a much longer time to process claims. In testimony before the Senate Energy Committee in February, Secretary of Energy Spencer Abraham committed to have 100 claims per week completed by August of 2003. But the DOE failed to meet that goal.

DOE has received a significant amount of funding to run the Workers Advocacy Office. The resources have been there, but the ability to get the program off the ground is lacking. DOE has also taken the position that it will assist claimants only to the point of advising them as to the process of filing a claim with the respective State agency. We believe that the OWA has been much too timid in its approach to claimant assistance and, as a result, many claimants, left to navigate the complexities of the various State workers compensation procedures on their own will continue to be frustrated in their efforts to receive the compensation due to them.

SPEEDUP CLAIMS PROCESSING

There are many possibilities for speeding up claims processing including requesting the assistance of the Department of Labor in developing claims and using the existing former worker programs to assist in developing claims, just to name a few actions.

WILLING PAYOR

There are several options available to resolve the willing payor issues:

DOE could enter into cost-reimbursement arrangements with a national (or site specific) non-risk bearing Third Party Administrator (TPA) to serve as the willing payor where (a) DOE contractors are no longer present at DOE sites, (b) where DOE contractors were not self insured and an insurance company "owns" the claim, or (c) where there is an exclusive state fund (OH, NV and WA).

Claims payments would be subject to appropriations. Levels of benefits would be set by state compensation agencies. The TPA would assume full liability in lieu of employers, insurers or others who could object to a claim. Presumably disability determinations would still have to be made by a state compensation panel. The Advisory Committee suggested this approach.

DOE could enter into contracts with exclusive state funds, insurers or TPAs to assume payment of claims in each instance where there is no willing payor. Ohio's exclusive state fund has made such a proposal.

FUTURE OF THE DOE FORMER WORKER PROGRAM

"And I think for one time in my life, I believe DOE is trying to do something." Testimony from Mr. S given at a DOE-sponsored public meeting in Las Vegas on February 25, 2000, on the Former Workers Program.

The Former Workers Program (FWP) was created at the Department of Energy in 1993 in response to the Congressional passage of Public Law 102, the Defense Authorization Act of 1993. Section 3162 of this law required DOE to evaluate the long-range health conditions of current and former employees who, as a result of their employment at DOE sites, may be at significant risk for health problems. The key objective has been to provide these former workers with medical evaluations to determine whether workers have experienced significant risk due to workplace exposure to hazards.

This determination has been made through twelve pilot programs established at eleven DOE sites across the country. Initially in 1996, six programs received funding to begin the pilot programs; in 1997 four additional programs became involved, and since then two more have been added as well. These pilot programs use a variety of investigative tools to establish whether workers face significant health risk including: risk assessment, worker history interviews and medical screening tests.

These programs have documented several significant findings.

- Sixty percent (60%) of the participants have significant health problems that can be ascribed to their work at the DOE sites.
- Workers have experienced a high prevalence of exposure to multiple hazards while working at DOE sites.
- The FWP's have comprehensively summarized work hazards for site worker populations.

- It is possible to locate and contact many of the former workers from these DOE sites.
- A significant proportion of the workers contacted want to participate in the program.
- Participants in the program have expressed a very high degree of satisfaction with the services provided by the independent former workers program.
- The approach to organizing these programs is highly cost effective in comparison to other medical programs within the DOE complex.

When the EEOICPA was being implemented the DOE Office of Worker Advocacy and the Department of Labor stressed the importance of these programs as a crucial resource to help workers with their claims. In fact, item 15 on the DOE form, Request for Review by Physician Panel (DOE Form F350.3), lists each of the FWP's and asks applicants to check off if they have participated in one of these.

We believe that the former worker programs could significantly aid in implementation of Subtitle D by providing exposure assessments and diagnostic testing for workers seeking compensation benefits. But rather than take advantage of this potential method for speeding claims processing, DOE has moved in the opposite direction. In a Guidance to the FWP's dated October 21, 2003 DOE proposed to phase out all but three of these programs and replace them with an unspecified new activity using a 1-800 call in process.

The sites to be phased out include Amchitka Island, Hanford, Idaho National Laboratory, Iowa Army Ammunition Plant, Los Alamos National Laboratory, Oak Ridge Construction Workers, Rocky Flats and Savannah River. These sites represent the bulk of workers potentially affected by this Act. The proposed action of DOE makes absolutely no sense. These former worker programs, which operate on a relatively modest budget and have medical and exposure data on tens of thousands of workers, will be forced to destroy this data and disband the institutional knowledge of worker activity and exposure that has been created with great difficulty.

Most important, thousands of workers are still waiting to be examined at the very sites the DOE proposes to abandon. As an example, at the Savannah River site, it took one of the two programs operating there 5 years to get the DOE to provide a data base of 13,000 eligible workers. This list of former workers only became available in a usable format this summer. Why the list was withheld for all of these years is inexplicable. Regardless, these workers should have a right to be examined through the former workers program now, but that will not be possible under this shift in policy.

We do not understand the underlying motivations of DOE in this case, since the agency is unwilling to explain its motivation to the organizations conducting the former worker program. The proposed phase out, at best, reflects a failure of coordination between two different program offices under the jurisdiction of the Assistant Secretary for Environment, Health and Safety.

At worst, it is another example of DOE's refusal to carry through its responsibilities to its work force. Given the massive problems that DOE currently has in carrying out its responsibilities under this compensation program, the decision to stop its one successful activity defies comprehension. This proposed phase out of the successful FWP programs is truly an example that good deeds seldom go unpunished. We urge the Committee to oppose the disbanding of these programs in the strongest terms.

CONCLUSION

Congress has made a firm promise that each nuclear worker with radiation cancer will receive compensation. That promise must be kept. We must also work to fix the problems with the DOE program, so those with other work-related illnesses caused by toxins at the DOE complex will receive workers' compensation payments.

Thank you.

Senator BUNNING. Thank you very much for your testimony.

I have so many questions, but I will start on the willing payor portion. At sites in Iowa, Ohio, Kentucky, Arkansas, and Colorado, DOE has not, I say has not, identified a willing payor. A willing payor is a title which DOE can direct the payment claim after going through all the process, the 2 years sometimes that it takes finally to get—up to 50 percent of the valid claims may not have a willing payor at DOE sites.

Now, this is highlighted in the GAO report. At Paducah, Leon, even after the fact that they have gone through, even after 83 people have gone through the claim and 82 have been refused and one has been found eligible for benefits, that person has not been paid. We have to have some solution to that, and we would like your suggestions on how we can get that done, because we are going to have to do it by law. DOE is going to sit on their you know what, their hands, until we do it by implementing some kind of law that requires either the Department of Labor or someone else to do it, because we are not getting any cooperation between the DOE and the workers comp people.

Mr. OWENS. I think, Senator Bunning, the first thing that Congress should consider is to ensure that there is a uniform level of compensation, and that could be based off of the Federal Employees Compensation Act, where you have certain wage replacement for loss of use of function.

The counterargument from some might be that you are in a way federalizing State workers compensation. We disagree with that argument. From the standpoint of this program, subtitle B, you have an entitlement program where appropriations were made by the Congress and individuals receive compensation based from that. So in no way do we feel that by having a uniform compensation mechanism that this Congress would be federalizing State workers compensation.

Senator BUNNING. Mr. Miller, do you agree that that is one of the ways, or Mr. Elisburg?

Mr. ELISBURG. Yes, sure. You could have the Department of Labor do it. You do not necessarily have to use the FECA system as much as you could set up a fund. You could set up something similar to subtitle D. There are any number of ways, and simply have some form of Federal payment.

Senator BUNNING. We thought we had done that.

Mr. ELISBURG. I think you did. I think all you thought was the States were going to be—

Senator BUNNING. You know, what we had to do was carry it across to the House of Representatives in person to the Speaker to get what we got done done. And we thought we had set up that kind of a program. Obviously, the Department of Energy does not believe that that is that kind of a program.

Mr. ELISBURG. I think that is right, and I think it goes to the issue that in fact these contractors are creates of the Federal Government. All the money comes from the Federal Government and whatever payment that is going to go out is a Federal payment in one fashion or another. It never comes out of anybody else's pocket.

Senator BUNNING. Mr. Miller.

Mr. MILLER. I think at the end of the day it is a question of money and where will it come from and who is on the hook for it. From our perspective, whether, as Don Elisburg said, it is FECA, which either provides for $66\frac{2}{3}$ of your average weekly wage, which is what you would get at the State level if you were getting paid through State worker compensation, or some lump sum settlement if it is a permanent disability, the question then becomes how would you fund those benefit streams.

Today, as Don Elisburg and others have said, if you had a self-insured contractor, like at Paducah you have Bechtel-Jacobs and they are self-insured for worker compensation at Paducah, and you can direct Bechtel-Jacobs using the energy and water appropriations that they are given each year to carry out their functions to pay claims with.

The question arises that if you then move that same function and the Labor Department is evaluating disability and they are setting some benefit level, whether it be FECA or some lump sum alternative, and you still have to figure out, do you want that to be an entitlement spending, direct spending like we went through 3 years ago, as you talked about—and I remember working vividly with you and Senator McConnell and others trying to get that very ball over the hump—or do you do it subject to appropriations?

The Federal Employee Compensation Act today operates subject to appropriations. Every Federal agency—the Department of Treasury, the Department of Homeland Security, the Department of Defense civilian employees—all reimburse the Department of Labor's fund on an annual basis for their outlays. So that each agency's budget includes a chunk to repay under FECA.

So you could have the Department of Energy with a special line item replenishing the fund.

Senator BUNNING. No, I do not want the Department of Energy involved in it. I am going to get it out of there as soon as I can.

I will come back to you, Dr. Burton. But Senator Murkowski, go ahead.

Senator MURKOWSKI. Thank you, Mr. Chairman, and I have a whole series of questions that I will submit for the individuals so they can respond in writing.

But just generally and kind of focusing on the GAO's review of the claims, we have heard that it does not work. I think certainly Senator Bunning and myself are in total agreement that it is not working, we have got to figure out a way to fix it. Is it the structural flaws in the system? Is it management issues? Is it—do we need more specialized expertise? Is it all just a question of funding? If you throw enough money at it, do we fix it? Or is it structurally flawed to the point where it is just not going to work?

Mr. Michaels, I understand that when this act was first passed you had supported DOE implementing subtitle D and now I understand that you have changed your mind. You folks as well as anybody out there understand what has happened and I would like to think can offer some substantive input in terms of what do we do, how do we deal with Mrs. Carlson's problem.

So have at it. Mr. Michaels, do you want to comment first?

Dr. MICHAELS. Thank you, Senator Murkowski. You are absolutely right, I was a strong supporter of this and believe it could have worked. But I think the currency has been spent and it would be very difficult to reconstruct this program at the Energy Department.

I think probably what needs to be done is we really need to sit down. I think there are a number of really important thinkers in workers compensation. I would actually—probably first is reconvene the advisory board that DOE disbanded and begin to work through this and say—I would actually probably suggest that in

the short run if legislation to shift it—I would support first shifting this to the Labor Department in the short run, just for administrative purposes. I realize that does not solve the issues that Mr. Miller raised around, and I think John Burton raised as well, around disability evaluations, a number of different issues.

But once we essentially move the program to get people through the system, I think we should sit down and really think through what is the best way to do this. I think it should be probably a program that looks very much like the Federal Employee Compensation Act, which Mr. Owens suggested, because in fact these are close to Federal workers. While these are State workers, they are covered by State systems, the reality is they are working under Federal rules. The Department of Energy regulates all these facilities.

We the Department of Energy—I was part of the Department of Energy—sets the wage rate, sets the conditions. When the contractor changes in one of these facilities, the top 12 people change; the workers remain the same. It is not Union Carbide or Martin Marietta or Bechtel. These are people who are working for the U.S. Government, but just paid through a contractor mechanism.

In some ways the easiest thing might be to say let us treat them in terms of benefit levels like Federal workers. I think that would be a big step forward.

Senator MURKOWSKI. Mr. Elisburg.

Mr. ELISBURG. Yes, Senator. With respect to Mrs. Carlson's claim, which has been publicized, it seems to me that this is a dramatic example of the Department of Energy walking away from its responsibilities, and there is no two ways about it. They led this woman along, they encouraged the claim, and then they dropped her.

With respect to what is going on in Alaska, without getting into all the details of the litigation, it has been a massive attack on this program by some contractors and the insurance folks in Alaska, for reasons that are unclear since it will never be any of their money. It will in fact be the Department of Energy's money.

It seems to me the Department of Energy ought to be up there up front defending its physicians panel determination. It ought to be defending the scope of the statute. It ought to be defending all of those basic issues which go to whether or not this is an appropriate Federal program.

One of the advisory committee recommendations, which might or might not work in a place like Alaska, was where you cannot find a contractor the whole point is to have someone who you can pay money to to run it through the system. The advisory committee suggested looking at creating a third party administrator, appoint them as the contractor in fact to deal with this claim, work an agreement with the State to accept them as the contractor that will supervise the payments, the medical payments—in a death case there is no medical payments—supervise the payments in this case, and in effect they are a contractor of record.

That provision, that was promoted rather heavily with the Department of Energy and we never did understand why it was not accepted. In fact, it was pushed by the contractor community that was a part of our advisory committee.

So that is just a few notions. But to simply stand by and say, well, we sent her there and there is nothing we can do I would say is not the appropriate response.

Senator MURKOWSKI. I appreciate that. Thank you.

Mr. Miller.

Mr. MILLER. I would just like to underscore one additional point, which is the Department of Labor's program today is, quote, "non-adversarial." The Energy Department does not intervene as an adverse party with a case it does not agree with. The contractors cannot intervene. There is no secret hand reaching into the hearing room or to the claims examiners when they evaluate the claim.

In effect, the Labor Department acts as the insurance company for the U.S. Government. They are the ones that evaluate whether it meets the statutory criteria. When you have a non-adversarial program, you have no lawyers, you have no litigation, the claim is either accepted or not, and you have an appeals process within, and if you want to the Federal courts.

We think that a non-adversarial structure is appropriate where you have claims, just as you do with other claims programs, for example, which cover the Radiation Exposure Compensation Act for uranium miners. Again, it is a claims program, and if this is structured as a claims program it should not be adversarial in its ultimate outcome.

Senator BUNNING. Thank you.

Senator MURKOWSKI. Thank you.

Senator BUNNING. I want to go back to some of the things that you have said, because Senator Bingaman and I put forth one suggestion for fixing the willing payor problem in legislation last Congress. In the legislation, workers comp for DOE employees was federalized—a bunch of you have suggested that—to avoid the willing payor issue.

Is there anyone here that would think that that is a bad idea? Go right ahead.

Mr. ROBERTSON. Being with GAO, I have to be a little cautious. [Laughter.]

Senator BUNNING. Well, speak up.

Mr. ROBERTSON. Just to remind you, our work at DOE is ongoing and we have just started the work at DOL. So, we are not in a position to make a commitment on that.

Senator BUNNING. I understand GAO's position.

Mr. ROBERTSON. Could I add another point?

Senator BUNNING. Go right ahead.

Mr. ROBERTSON. We have been talking about a number of alternatives, some of which are dramatically different to the program that is in place now. I would just also say that we ought to look for what is happening in the real short run, which is DOE still has the program. I would just like to reiterate what Senator Talent talked about earlier—and I think you did, too—and that is, in the mean time while we are thinking about all these other options and alternatives, that there is some mechanism put in place to hold DOE accountable for implementing the program that it was given to implement.

Senator BUNNING. Well, there are a lot of things we can do. One is to cut off their money and make them a nonexistent Department

if they do things like that. But those are radical things and a lot of us do not like to do those kind of things.

But to stimulate their participation, their active positive participation in this program, we have to do something different than what we are doing, because they are obviously adversaries of those filing claims and that is not the way it was set up.

GAO has indicated that the Department of Energy does not have an adequate computer system in place to track the status of claims and the reason for determining a claim ineligible, a claimant ineligible. How does the DOE computer system compare with claims processing operations you have evaluated in other agencies? Is the DOE program vulnerable to legal challenges because it has failed to ensure consistency in processing its claims?

Mr. ROBERTSON. Here is what has happened with the system they had in place, and it is one of the reasons, frankly, why we cut off our data analysis at June 2003. We had done a data reliability test on the system that DOE had in place at that time. In July they made some changes to that system that were supposed to correct some of the problems that we identified and that you alluded to. We have not gone back and seen whether, in fact, they have been corrected. So we will be doing that as part of our ongoing review.

Senator BUNNING. Given the complexities involved with the claims that have been filed, do you think that, like the Department of—and I would like to hear from Dr. Burton on this—that the Department of Labor, assigned the same responsibilities, would have encountered similar problems that DOE has encountered? You seem to think that the Department of Labor is not a good place to go.

Dr. BURTON. Well, I think the Department of Labor may be better than the Department of Energy, but I think we need to be realistic about what you are going to gain by shifting this from DOE to Department of Labor. For example, the Department of Labor has some types of cases which are readily—can be readily processed.

But there are a set of claims that the Department of Labor currently has responsibility for that require dose reconstructions from NIOSH, and those have not been processed very rapidly. Now, it is not the Department of Labor's fault. The point is there is nothing inherent about getting claims-handling at the Department of Labor that is going to make things go faster. I think if you simply transferred over the title D as it now exists you are going to have pretty much the same set of obstacles to processing these claims no matter who is handling them.

Senator BUNNING. So you would have to change the way that the claimants file and process the claims?

Dr. BURTON. Well, let me make clear again. I think probably if it was a Department of Energy transfer to the Department of Labor things are going to go faster. Certainly the experience we had on our committee was frustration about the fact that things were not being done very efficiently or effectively at the Department of Energy.

But I think there is only a limited amount of gain you are going to get by switching it to Department of Labor, unless you fundamentally change the program. That is why I have suggested, for

various reasons, and I think based on the experience of the last couple of years, several of us have come around, Dr. Michaels and myself included, to the notion that the whole scheme that is in title D of meshing State and Federal programs is not going to work.

The only thing I would differ from what other persons on the panel is Mr. Owens seemed to be reticent to call that federalization of title D. I would call a spade a spade. Let us federalize title D, get the States out of it.

Senator BUNNING. We tried. We put—Senator Bingaman and I tried very hard to do that.

Dr. BURTON. Well, obviously I am not the politician here. I am simply the person trying to—from my standpoint I do not think the mixed State-Federal program is going to work, no matter who is running it, and therefore I think we need to drop back and redo it. I realize that that may be difficult to do, particularly between now and the end of this session.

Senator BUNNING. Mr. Owens—well, we are not going to be able to do it between now and the end of the session. Maybe next year some time.

Mr. Owens.

Mr. OWENS. Senator Bunning, I respectfully disagree with Dr. Burton, from the standpoint of not gaining much if we transfer the program from the Department of Energy to the Department of Labor. I think there are two issues. One is transparency, the other is credibility. By transparency what I mean is a full understanding by the claimants, by these sick workers, by these widows, of what the program intent, what its intention is.

Credibility. As of right now there is very little credibility within the DOE complex by any of these workers with anything that DOE does. That is a problem that will continue to exist, notwithstanding the adversarial process that they continue to bring to the table. So that would be an immediate benefit.

We do not want to see sick workers not file claims because of a process that is so convoluted that, number one, they are going to die before they even see any type of realization of their claim even being processed, let alone receive any compensation. So those are the immediate benefits that I see.

Senator BUNNING. Mr. Elisburg, go ahead.

Mr. ELISBURG. Mr. Chairman, two points I would like to make about your question. The first is that even if you were to send this to the Department of Labor, where I think you would have far more efficiency and movement, it is clear that, because of this so-called willing payor issue, there needs to be made clear—that is, if you are still going back to these contractors to process it—that in the absence of a contractor the Department of Energy will assume responsibility for payment or something quite that simple to fix this willing payor in language.

That is one way to get out from under that issue, so that there is somebody out there.

[Room lights flicker.]

Senator BUNNING. I think they are trying to tell us something.

Mr. ELISBURG. The second point of this, having listened to the testimony this morning, is—and it goes to I think Leon's discussion of perhaps credibility—it seems very clear that the Department of

Labor in this program has been a willing payor and the Department of Energy has not been a willing payor, and I think that goes to the heart of how do you make this program work.

Mr. MILLER. If I could just underscore one point, Senator.

Senator BUNNING. Make it quick.

Mr. MILLER. The only point is that the DOE serving as a “willing payor,” quote unquote, raises a very profound question: Can they actually manage that? If they cannot even manage to move their claims, can they possibly manage the complexity of being the willing payor?

Senator BUNNING. Okay. Those of you who wish to submit testimony or questions for the record should do so by the end of the day on Monday, November 24. We also may submit questions on behalf of the committee to each and every one of you that we have not asked today.

I thank you for your testimony and the committee is adjourned.
[Whereupon, at 12:14 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

DEPARTMENT OF ENERGY,
CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, January 20, 2004.

Hon. PETE V. DOMENICI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: On November 21, 2003, Robert G. Card, Under Secretary of Energy, testified regarding the status of implementation of the Energy Employees Occupational Illness Compensation Program.

Enclosed are the answers to 21 questions submitted by Senators Murkowski, Schumer, and Campbell to complete the hearing record.

If we can be of further assistance, please have your staff contact our Congressional Hearing Coordinator, Lillian Owen, at (202) 586-2031.

Sincerely,

RICK A. DEARBORN,
Assistant Secretary.

[Enclosures]

RESPONSES TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. I understood you to state at the November 21, 2003 hearing that the Department of Energy (DOE) does not believe that Congress intended in the Energy Employees Occupational Illness Compensation Program (EEOICPA) that the DOE: i) defend findings by DOE Physician Panels when they are challenged by counsel for DOE contractors or insurance companies; or ii) affirmatively seek to find a willing payor for claims by Alaskans or citizens of other states with nuclear facilities:

a) Is my understanding correct? Please provide a detailed narrative explaining the legal, statutory interpretation or other bases for DOE's answer to these questions.

Answer. In accordance with EEOICPA Part D, DOE "may to the extent permitted by law, direct the Department of Energy contractor who employed the applicant not to contest such claim or such award." DOE issues such directives to the extent permitted by law, and expects contractors subject to such direction not to challenge Physician Panel determinations.

However, with respect to contractors or insurance companies where DOE has no legal authority to provide direction, DOE has no legal ability to prevent the contractor or insurance company from challenging Physician Panel findings. In those situations, DOE only can provide assistance to the applicant by providing the applicants with physician panel determinations on whether the claimed condition(s) were related to work at a DOE facility. The "assistance" provided by DOE, in accordance with the statute, is to assist the employee with obtaining evidence of injury or illness, and to provide to the employee the opinion of a Physicians Panel. The process for adjudicating a claim for such an employee takes place in a state system, outside DOE control.

With respect to so-called "willing payors," DOE does affirmatively seek to find a willing payor for all claims. If, in accordance with the statute, DOE can legally order a contractor not to contest a claim, it does so. In other cases, state law may dictate

that workers' compensation claims be paid by a state fund or insurance coverage. DOE has addressed this very complex willing payor issue on a case by case basis because, in dealing with scores of DOE sites, hundreds of contractors, differing state laws, and covering 50 years, the answers vary widely. Because of the complexity and importance of this issue, DOE has taken the initiative to review and identify which contractors at the major DOE sites where most of the applications are being filed are subject to a directive by DOE not to contest workers' compensation claims. Results of this review should help clarify the status of the contractual relationships between contract employees, Department of Energy contractors, and the Department of Energy.

With respect to the Amchitka Project in Alaska, DOE has not found a legal way to order former Amchitka subcontractors to not contest workers' compensation claims. In those cases, those workers will have to depend on the Alaska State workers' compensation process to identify payors, such as commercial insurance companies. With respect to cases involving the four major DOE contractors at Amchitka from 1965-1972, the responsibility for satisfying workers' compensation claims by employees of those contractors has contractually passed through the years to a current DOE contractor. The study discussed above or the first case presented in the Alaska workers' compensation system will confirm these payor relationships.

Question 2. Please explain why DOE terminated the Worker Advocacy Advisory Committee.

a) I understand DOE indicated it plans to reconstitute the Committee. Is this correct? If not, why not? If yes, when does DOE plan to have the reconstituted Committee operating?

Answer. The Federal Advisory Committee Act requires federal agencies to set an expiration date for advisory committees, typically two years from the date the charter is approved. The expiration date for the Worker Advocacy Advisory Committee was January 2, 2003. The committee's charter was to advise the Department on the establishment of the Office of Worker Advocacy (OWA). By January 2003, the Office of Worker Advocacy was well underway, and the Department determined that the committee had fulfilled its charter. So, the committee's charter was allowed to expire as scheduled, on January 2, 2003.

OWA recognizes the value of advisory committees, and we are in the process of forming a new committee, the Workers' Compensation Assistance Advisory Committee. DOE will work with this new Advisory Committee to develop recommendations for moving forward. We believe the new committee should be up and running in March 2004.

Question 3. On June 27, 2002, the Worker Advocacy Advisory Committee sent a letter to DOE which, among other things noted that if, "DOE is unwilling or unable to pay these claims, it is absolutely essential for DOE to seek additional appropriations or support alternative legislative solutions that will result in payment of these claims without throwing them into the state workers' compensation systems to be litigated." On August 9, 2002, DOE responded stating, in part:

"The issue of mechanisms of payment of claims where there is no current contractor with responsibility for paying a claim remains a concern. We will continue to explore possible remedies with the WAAC, the General Counsel and Congress to correct this inequity."

a) Has DOE made any proposals to Congress to address and remedy the willing payor problem since this letter was sent? If not, why not? Please provide a detailed answer to this question including cites to any legal authority on which DOE may rely to answer this question.

b) Does DOE plan to provide Congress with a comprehensive plan to address and remedy the willing payor issue? If yes, when?

Answer. a) DOE recognizes Congress's concern that under the terms of EEOICPA Part D, DOE is not permitted to direct certain contractors to not contest workers' compensation claims of their employees, nor is DOE allowed to overrule State workers compensation laws, nor is it allowed to pay claims independently. DOE representatives have had numerous discussions with Congressional staff members and stakeholder groups about this issue. DOE is working through the complexity of the legal and regulatory frameworks, and the various stakeholders' goals in relation to the States' workers' compensation programs and the legal relationships between the Department and its contractors.

b) DOE is developing a plan to eliminate the entire backlog of Part D EEOICPA cases.

It should be noted that the lack of a "willing payor," as this term is normally understood in the EEOICPA Part D context, does not mean the Part D applicant can-

not receive workers' compensation. It simply means DOE cannot direct the contractor employer not to contest the claim. Applicants can still apply to the Department's Part D program, still make application for workers' compensation through their State agencies, and if they are entitled to benefits under State law, they will receive those benefits.

Question 4. At the hearing, there was extended discussion of DOE's claims processing record under Subpart D of EEOICPA. Please provide a detailed explanation of DOE's commitment concerning claims processing. Please include the following information in your answer:

- a) the number of claims DOE will process per month beginning December 2003 and extending through the time DOE believes it will eliminate the claims backlog.
 - i) based on DOE's experience to date, please include in this answer, on a monthly basis, the number of claims DOE expects it will reject because the claimants are not eligible; and
 - ii) the number of claims DOE will process and provide to the Physician Panels.
- b) Please state the funding level DOE believes will be necessary to achieve the claims processing level DOE plans to achieve in FY 2004 and 2005.

Answer. The Department is developing a plan to eliminate the entire backlog of Part D EEOICPA cases currently on file with DOE.

With respect to cases, DOE is on track with its interim goal of processing 100 Part D cases per week up to the Physician Panels. DOE has entered into discussion with representatives from the medical community regarding their views on changes required to increase output by the Physician Panels (the backlog awaiting physician review is growing at approximately 80 cases per week while the physicians are processing 17 to 20 cases per week). The medical community has indicated that process improvements alone will not achieve the output required to eliminate the current and growing backlog, and must also include additional funding, as will be requested in the FY04 reprogramming request and the FY05 Budget Request.

With respect to ineligible cases, DOE conducts an initial review of every case it receives to determine eligibility under Part D of EEOICPA. As a result, DOE has already identified most of the ineligible applications currently filed. As shown on our web site (<http://www.eh.doe.gov/advocacy>), as of January 2, 2004, DOE has received 21,861 Part D applications of which 1,110 have been found ineligible, or 5 percent. Assuming that 5 percent of all new cases are found ineligible and that applications continue to arrive at 130 per week, approximately 6 to 7 applications per week might be found ineligible.

The funding levels necessary to implement the plan DOE is developing to eliminate the entire backlog will be transmitted to Congress promptly.

Question 5. Please provide an explanation of DOE's position on the Grassley-Murkowski amendment. If DOE supports the amendment, please provide a detailed narrative explanation of the reasons for DOE's support including any legal citation supporting DOE's position.

- a) If DOE opposes the amendment, please provide a detailed narrative explanation of the reasons why, including any legal citation supporting DOE's position.

Answer. Based on the latest internal process reviews of the EEOICPA Part D process, DOE believes the Grassley-Murkowski amendment, in the form that amendment was passed by the Senate several months ago, would not improve the efficiency of processing Part D applications.

The amendment did not address the critical bottleneck at the Physicians' Panels, or otherwise reform the requirements and processes for Part D applications. Moreover, the amendment bifurcated between two agencies the processing of application up to the Physician panels. This would create new/uncharted coordination issues and eliminate clear demarcations for responsibility.

Question 6. Did the DOE have any contact with any Member of Congress or their staffs or the staff of any Congressional Committees concerning the Grassley-Murkowski amendment? By contact, I mean communications of any kind including oral, written, telephonic, e-mail or other electronic form of communications. If yes, please provide the following information:

- a) individuals in DOE present or participating in each communication
- b) date of each communication
- c) name and position of each individual in Congress with whom a communication took place
- d) name of individual(s) who initiated each communication
- e) summary of the substance of each communication

f) if the communication was in written or electronic form, a copy of the communication.

Answer. Certain DOE employees with responsibility for communicating with Congress on DOE-related matters had contact with Members of Congress or their staffs concerning the Grassley-Murkowski EEOICPA amendment that the Senate passed as an amendment to H.R. 2754, the Fiscal Year 2004 Energy and Water Development Appropriations bill. Deputy Secretary McSlarrow had a telephone conversation with Senator Grassley on this subject on or about October 27, 2003. Various employees in DOE's Office of Congressional and Intergovernmental Affairs communicated on this subject with Members of Congress or staff from the offices of Sen. Murkowski, Sen. Nickles, Sen. Breaux, the House Energy and Water Development Appropriations Subcommittee, and the Senate Energy and Water Development Appropriations Subcommittee.

In general, during these communications DOE stated its position that it did not support the Grassley-Murkowski amendment and expressed its belief that the amendment would not solve the problems that exist with the current EEOICPA Part D program. DOE does not have records identifying the dates that these communications occurred. DOE believes one or more of those communications may have been in written or electronic form, but does not possess copies or records of such communications.

Question 7. Does DOE have in its possession any document in electronic or any other form concerning the Grassley-Murkowski amendment? If yes, please provide a copy of the document. This question includes documents generated by DOE or received by DOE from any entity outside DOE.

Answer. DOE staff prepared a brief legislative analysis of the Grassley-Murkowski amendment. The text of that document is as follows:

"The Grassley Amendment, in effect, transfers one part of DOE's process to the DOL, namely the case assembly. DOE would retain the responsibility to receive applications (which DOE does jointly with DOL for both subparts B and D), to collect worker employment/exposure/medical records from the field, to manage the physicians panel process, and to order contractors where DOE legally can to not contest workers' compensation claims.

"DOE does not support the amendment for the following reasons:

- The Amendment appears to have no benefit to the subpart D program applicant.
- DOE has submitted a reprogramming request to accelerate subpart D case production."

DOE received a copy of OMB's letter to the Chairman of the Committee on Appropriations of the U.S. House of Representatives, dated October 16, 2003, in which the Administration stated its position on the Grassley-Murkowski amendment. This letter states:

"The Administration would strongly object if the conference report included a provision in the Senate bill that would transfer certain duties under Subtitle D of the Energy Employees Occupational Illness Compensation Act from the DOE to the Department of Labor. The Subtitle D program should work to help beneficiaries but the provision would create an unworkable and overly complex administration structure that may detract from the program's service delivery. Further, the provision to transfer \$7.5 million from this activity (a 47-percent reduction) to the National Institute of Occupational Safety and Health to conduct epidemiological research would undermine DOE's efforts to expedite the backlog of unprocessed claims."

Question 8. It is my understanding that DOE has hired Scientific Engineering Associates (SEA) to design, implement and manage DOE's claims processing under Subpart D of the EEOICPA. Is this correct?

a) If yes, how many SEA personnel will be involved in FY 2004 and 2005?

b) Please provide the total funds paid SEA for all their services for DOE in managing the DOE EEOICPA Subpart D claims processing in FY 2001, 2002, and 2003. What is the total funding DOE plans to give SEA for their work on Subpart D of EEOICPA in FY 2004 and 2005?

c) How many DOE/federal personnel were involved in the EEOICPA Subpart D claims processing effort in FY 2001, 2002, and 2003? How many DOE/federal personnel will be involved in FY 2004 and 2005?

Answer. DOE has entered into an Interagency Agreement with the Department of the Navy to provide support for EEOICPA activities. SEA is the Navy's con-

tractor. The Interagency Agreement expires at the end of calendar year 2004; as a result, DOE cannot project whether SEA will continue to perform work for DOE beyond that date. Under current budget plans, SEA employs approximately 110 personnel on this project, which could double if the reprogramming request currently being prepared by DOE is approved.

Prior year funding to the Navy for this work was as follows:

FY 2001—\$0
 FY 2002—\$3.6 million
 FY 2003—\$8.1 million

Under the current budget and with the FY04 reprogramming request, DOE expects to provide \$11 million in funding for SEA in FY 2004.

DOE Federal staff involved in EEOICPA efforts started with one Federal staff member in FY 2001. Currently, the DOE Office of Worker Advocacy consists of 9 Federal staff. If the FY 2004 reprogramming request that DOE is developing is approved and anticipated FY 2005 budgets are achieved, DOE expects to add 3 to 12 additional Federal staff to oversee and effectively manage the program.

Question 9. As DOE noted during the hearing, there are presently no willing payors in Alaska. How does DOE plan to address this issue and ensure that Alaskans found eligible for compensation by Physician Panels are provided with compensation? Please include all legal citations, statutory interpretation and any other bases that support DOE's response to this question.

a) Does DOE believe that the EEOICPA provides it with the authority to compensate Alaskans who receive positive findings from Physician Panels? Please include all legal citations, statutory interpretation and any other bases that support DOE's response to this question.

i) If not, does DOE have any proposal about how to address the willing payor issue?

Answer. The EEOICPA statute does not authorize DOE to pay claims directly. However, the statute does state that DOE "may to the extent permitted by law, direct the Department of Energy contractor who employed the applicant not to contest such claim or such award."

With respect to contractors or insurance companies where DOE has no legal authority to provide direction, DOE has no legal ability to prevent the contractor or insurance company from challenging Physician Panel findings. In those situations, DOE only can provide assistance to the applicant by providing the applicants with physician panel determinations on whether the claimed condition(s) were related to work at a DOE facility. The "assistance" provided by DOE, in accordance with the statute, is to assist the employee with obtaining evidence of injury or illness, and to provide to the employee the opinion of a Physicians Panel. The claim adjudication process takes place in a State workers compensation system, outside DOE control.

With respect to so-called "willing payors," DOE does affirmatively seek to find a willing payor for all claims. If, in accordance with the statute, DOE can legally order a contractor not to contest a claim, it does so. In other cases, State law may dictate that workers' compensation claims be paid by a State fund or insurance coverage. DOE has addressed this very complex willing payor issue on a case by case basis because, in dealing with scores of DOE sites, hundreds of contractors, differing state laws, and covering 50 years, the answers vary widely. Because of the complexity and importance of this issue, DOE has taken the initiative to review the willing payor issue at the major DOE sites where most of the applications are being filed.

Question 10. Until May 2003, in response to questions from members of Congress (Senator Bunning and Congressmen Turner and Whitfield), DOE told Congress they did not need additional funds to implement Subpart D of the EEOICPA. What was the basis for this position?

a) Please explain why DOE has changed its position and asked for more funds to implement Subpart D.

b) When did this change in position occur?

Answer. Around the time that EEOICPA was passed in 2000, and, given the complexity of the process mandated in the authorizing legislation and the expected complexity of the physician panel reviews to be conducted, the Department of Energy was planning on ten years to completely review all applications. However, as the number of applications has more than tripled original expectations, and as it has become clear how great the applicants' immediate need for this data is to effectively pursue State workers' compensation claims, the Administration has implemented specific reforms such as budget reprogramming and process improvements and is developing a comprehensive three-year program to completely eliminate the backlog

of applications. The summer of 2003 reprogramming request provided needed resources to match dramatic increases in applications relative to initial expectations.

Question 11. During briefings for members of Congress and their staffs Assistant Secretary Cook stated that DOE was working to “reach out and touch” its contractors and other entities to assure that there would be a willing payor for valid claims. Please provide a detailed review of specific actions taken by DOE to assure claimants in Alaska and other states that there will be willing payors for claimants who are found eligible for compensation.

Answer. DOE does affirmatively seek to find a willing payor for all claims. If, in accordance with the statute, DOE can legally order a contractor not to contest a claim, it does so. In other cases, state law may dictate that workers’ compensation claims be paid by a state fund or insurance coverage. DOE has addressed this very complex willing payor issue on a case by case basis because, in dealing with scores of DOE sites, hundreds of contractors, differing state laws, and covering 50 years, the answers vary widely. Because of the complexity and importance of this issue, DOE has taken the initiative to review the willing payor issue at the major DOE sites where most of the applications are being filed.

Question 12. During the November 21 hearing on the EEOICPA, the DOE indicated that once claims are processed promptly, Physician Panels may be unable to review and act on the number of claims being processed in a timely manner. Please provide a written narrative explaining DOE’s proposal to address this issue.

a) If DOE has no proposal to address this issue, please explain why DOE does not believe it has authority to address this issue and provide citations to all legal authority which support DOE’s decision not to address this issue.

Answer. In order to eliminate the current and growing backlog awaiting Physician Panel review, these panels will need to increase output significantly from the current 17-20 cases per week. Despite significant performance improvements in the EEOICPA Part D process, the significant gap between the number of applications received and the productivity of the process cannot be addressed solely by additional performance improvements, and will require additional funds, as is being requested in the FY04 reprogramming request and the FY05 Budget Request. Furthermore, the Department is currently developing a plan to eliminate the backlog of claims.

RESPONSES TO QUESTIONS FROM SENATOR SCHUMER

Question 1. Why have no claims been paid to sick New York workers in three years under the DOE-administered program?

Answer. Part D of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) authorizes DOE to assist applicants by collecting their record’s and presenting their case file to a Physician Panel which determines if the applicant’s illness was due to their work in a DOE facility. DOE provides this Physician Panel determination to the applicant. The applicant may use the case file and a positive Physician Panel determination to support an application for State workers’ compensation. In addition, the Department of Energy will not contest, and will direct its contractors to the extent permitted by law not to contest, such state workers compensation applications derived from positive Physician Panel determinations. The Department is currently developing a plan to eliminate the current and future backlog, and the Administration is conducting a review of the willing payor issue.

Question 2. Does DOE have a target date to complete claims for EEOICPA Part D?

Answer. The Department is developing a plan to eliminate the entire backlog of Part D EEOICPA applications. Currently, the backlog awaiting physician review is growing at approximately 80 cases per week while the physicians are processing 17 to 20 cases per week. This significant gap between applications received and the productivity of the process cannot be addressed simply through additional performance improvements and will require additional funds, as is being requested in the FY04 reprogramming request and the FY05 Budget Request.

Question 3. Why has every single claim from New York processed by DOE been denied a review by a physician’s panel in three years?

Answer. No claims from New York have been denied a review. Rather, the Part D applications filed with DOE by residents of New York still are being developed for review. The Department is developing a plan to eliminate the entire backlog of Part D EEOICPA applications, including those from New York.

Question 4. Experts estimate that tens of thousands of people worked as employees of DOE and contractor facilities over the last 50 years in New York. Yet, few people have applied. To date, DOE has received only 181 applications. They need

to establish a better channel of communication with their former employees. This situation begs the question, why does New York State have no resource centers used for outreach to former employees when we have the most combined DOE and contractor facilities (36) in the country?

Answer. Most New York facilities were not DOE facilities; instead, they were privately owned and operated. Under EEOICPA, these facilities are defined as Atomic Weapons Employers and Beryllium Vendors. Workers at these facilities are covered only by Part B, which is administered by the U.S. Department of Labor (DOL). DOL's website (<http://www.dol.gov/esa/rep/compliance/owcp/eoicp/Statistics/ny.html>) indicates that there are over 2,400 claims filed for Part B.

For the DOE Part D program, 187 applications have been received from applicants in New York.

DOE and DOL have performed extensive outreach in New York, including four visits by Traveling Resource Centers and over 3,000 letters to DOE contractors and Atomic Weapons Employers retirees and union members. In addition, DOE and DOL provide assistance via toll-free numbers. While DOE has located its fixed resource centers in close proximity to major DOE facilities, DOE's implementation of the EEOICPA statute includes multiple communication channels for both workers covered under EEOICPA Part D and anyone with questions regarding this program.

RESPONSES TO QUESTIONS FROM SENATOR CAMPBELL

Question 1. Could you please explain where the trouble spots are so that our workers can get the help that they desperately need and deserve?

Answer. Currently, the backlog awaiting physician review is growing at approximately 80 cases per week while the physicians are processing 17 to 20 cases per week. DOE is currently investigating and implementing process improvements to increase throughput to the Physician Panel review process. DOE is also pursuing process improvements in the Physician Panel determinations. Despite significant performance improvements in the EEOICPA Part D process, the significant gap between applications received and the productivity of the process cannot be addressed solely by additional performance improvements and will require additional funds, as is being requested in the FY04 reprogramming request and the FY05 Budget Request.

Question 2. I understand that DOE does not actually pay the workers. Could you please explain for clarify who actually does the paying?

Answer. DOE assists applicants by collecting their records and presenting their case file to a Physician Panel which determines if the applicant's illness arose from the worker's exposure to a toxic substance while working in a DOE facility. DOE provides this Physician Panel ruling to the applicant. The applicant may use the case file and a Physician Panel ruling to support an application for State workers' compensation. If the State determines that the employee should be awarded workers compensation, the employee is paid that compensation as directed by that State's laws.

Question 3. I have heard from constituents in my state that DOE's subcontracting Third Party Administrator is not processing claims. Could you explain whether this is true, and if it is, what do you recommend so that we can correct this problem?

Answer. Rocky Flats is looking at ways to improve and streamline its process for expediting claims through the State Worker Compensation Program in Colorado through a specially designated Third Party Administrator. They are in the initial stages of pulling together the program. Contractual and legal issues need to be coordinated with previous contractors before the program can be fully implemented. However, all applicants, who have received positive Physician Panel rulings and who have filed for Colorado State workers' compensation, are in process with this Third Party Administrator.

Question 4. Some folks have expressed concern with the physician panel's denial of claims, citing a denial rate of around 50% of those that actually have been processed. Could you clarify how the physician panels determine causation of illnesses?

Answer. The Physician Panels evaluate each case individually, based upon the established criteria. The Department of Energy does not have any expectations with respect to how many cases will receive positive or negative determinations from the panels. One reason that many Part D cases are denied is that we have a very welcoming policy, encouraging as many potential applicants as possible to participate in the Part D program. Given the complexities of the Part D program and the wide variety of eligibility criteria for State Workers' Compensation, we want to cast as wide a net as possible.

Question 5. Implementing this program is incredibly complex, with several parties involved. Sorting this out is certainly a difficult job, but the people who are sick don't have the luxury of waiting for us to do so. In your opinion, what can Congress do to help the beneficiaries who are due compensation?

Answer. The Department is developing a plan to eliminate the entire backlog of Part D EEOICPA cases. However, the backlog awaiting physician review is growing at approximately 80 cases per week while the physicians are processing 17 to 20 cases per week. This significant gap between applications received and the productivity of the process cannot be addressed only by additional performance improvements and will require additional funds, as is being requested in the FY04 re-programming request and the FY05 Budget Request.

APPENDIX II

Additional Material Submitted for the Record

COALITION FOR A HEALTHY ENVIRONMENT,
Knoxville, TN, March 28, 2000.

Senator LAMAR ALEXANDER,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR ALEXANDER: Let me begin with thanking the Senator raising the worker health problems to open senate committee process and receiving written testimony in order to accurately address the extent of the problems and seek more effective remedies such as removing DOE from the Compensation Act (EEOCIPA).

I submit my testimony as a former Security Police Officer, Police Supervisor and police Training Commander with knowledge of problems at the K-25 site and DOE sites in general.

I apologize for the structure of this testimony and the grammatical errors . I have lost a lot of my former abilities.

Kindest regards,

HARRY WILLIAMS,
President.

STATEMENT OF HARRY LEE WILLIAMS, PRESIDENT,
COALITION FOR A HEALTHY ENVIRONMENT

INTRODUCTION

Mr. Harry Lee Williams worked as a Security Police Officer (SPO) SPO Supervisor and Training Officer at the K-25 plant in Oak Ridge, Tennessee, 1976 to 96. He was negligently exposed by DOE on its inherently dangerous K-25 site to cyanide, hydrogen fluoride, nickel, mercury, other heavy metals, radiation, criticality and other presently unknown toxic hazards at the chemically and radiologically contaminated K-25 Plant (K-25).

The plant process and research programs also involved many classified compounds. The Department of Energy is guilty of negligence, including failure to enforce and apply DOE orders or proper oversight and management of its primary contractor, Lockheed Martin Energy Systems (LMES or LOCKHEED), which resulted in physical, mental and emotional damage by DOE and its agent and contractor, LOCKHEED. The respondent did not hire into a active national defense facility nor did he intend to. This was a job that on its face enriched uranium to 3 to 4% to power commercial reactors.

Respondent asked frequently/periodically if he was being exposed to any substance that would cause him harm. His employer always insisted the workplace was safe in fact safer than at home. We now know better! I was told recently by former plant Shift Superintendents of the mid night (undocumented) purging releasing large volumes of UF6 etc. to atmosphere. The K-25 site has more ghosts and horrible stories than any other gaseous diffusion plant.

We in Oak Ridge are also haunted by the operations and legacies of Y-12 and ORNL (X-10). The government has a duty to expose and correct these problems. GOD HELP OAK RIDGE. Respondent recently received multiple diagnosis of diseases that have impacted my respiratory and nurelogical functions resulting in a workers compensation settlement against DOE and its contractor through the normal state system. I could not get a timely review of my situation through Sub Part D of the EEOIPA costing me 28,500.00 in attorneys fees.

1. Describe the Nature and Extent of Each Injury

Mr. Williams suffers from Depression; fatigue; suicidal ideation; short-term memory loss; loss of concentration; muscle and joint soreness throughout body; tingling

and numbness of extremities; reduced abilities to work with his hands; chronic heart disease (two heart attacks, heart aneurysm, two heart surgeries (angioplasty and a stint) palpitations; atreal fiberlation, diagnosed with a rare form of bronchitis, abnormal blood test (LPT) for beryllium disease, National Jewish Pulmanolgist stated that my lung lavage had abnormalities consistent with Chronic Beryllium Disease (CBD), shortness of breath, even with small exertions or sedentary activities; extreme and abnormal sensitivity to heat, painful at room temperatures, comfortable for most people; extreme sweating and hot flashes for no apparent reason, diffuse and extreme sweating on small exertions; night sweats; excretion of unexplained elevated levels of calcium from the urine; significant weight gain and loss, particularly in the abdomen and stomach; reduced desire for sex; eye and nose irritation; immune system disorders, such as Diabetes; poor gas exchange in my lungs, my larynx operates abnormally consistent with toxic chemical exposures; heavy metal and toxic body burdens are confirmed by laboratory tests to include extremely high levels of PCBs, Arsenic, Cyanide, and Mercury etc..

1. DOE and its contractor negligently failed to relocate Harry Lee Williams from the Oak Ridge K-25 Site from January 13, 1989 until November 27, 1993. On March 8, 1996, through July 23, 1996, Respondent became aware of toxic poisoning of his body and asked for removal from the toxic K-25 workplace. On March 28, 1996, Dr. Joel Perkerson, Primary Care Physician (PCP) removed Williams from this unhealthy environment DOE's negligence has resulted in significant compromise to Respondent's quality of life, ability to earn a living, mental health, and physical health to the extent of being permanent and irreparable. Mr. Williams is now suffering on long term disability.

2. DOE is guilty of negligence by failure to inform Respondent and other workers of the toxins and contaminants present in his workplace and of the dangers these substances posed to his health and well being.

3. DOE is guilty of negligence in allowing LMES to inadequately acknowledge and investigate his complaints of an unsafe workplace. Therefore DOE is guilty/responsible for various toxins entering his body.

4. By April 1995, DOE's contractor was on notice that workers at the K-25 plant were getting sick and wanted to be moved to other off site/reservation facilities. DOE negligently failed to enforce its contracts and federal law and failed to adequately monitor, audit, guide, manage and train its contractor in responding to these serious environmental health and safety concerns. As a result of this life-threatening DOE negligence, Respondent and other workers were met by a hostile employer with resistance, delays and rudeness from LOCKHEED, which sought to suppress health concerns about the K-25 uranium enrichment plant site. Respondent was not initially accepted by LMES as a participator in the so called cyanide working group. Respondent was further denied access to the National Institute of Safety and Health Surveys by LMES. Respondent had to locate Mrs. Worthington through the Internet on his own initiative outside the workplace.

5. Since March 28, 1996, Respondent has been on short term and then on long term disability. He is unable to work at any occupation.

6. Respondent was diagnosed with Chemical encephalopathy and other impairments from toxic exposures by Dr. Kaye H. Kilburn, M.D., from the University of Southern California's Environmental Medicine Clinic. He submitted results from two hair samples submitted to his PCP. These hair analysis show heavy metal poisons and heavy metals, including arsenic, chromium, lead, tin, calcium, magnesium, Antimony, Arsenic, Beryllium, Bismuth, Cadmium, Mercury, Silver, Aluminum, Iron, Nickel, Thorium, Uranium, and Germanium, Rubidium, Titanium, Zirconium, magnesium, Cobalt, Vanadium, Molybdenum, Boron, Lithium, Phosphorous, Selenium are present in Respondent's body, due to his occupational exposures at DOE's negligently managed K-25 and Y-12 sites.

7. DOE's contractor resisted filing medical reports and discouraged Respondent from raising concerns about his health. DOE's negligent failure to enforce its contracts, orders and standards and other federal and international legal obligations caused damages to Respondent.

8. Respondent's future medical conditions from exposure to these toxins and the synergistic effects from the combination of these toxins within his body are not fully known at this time because of the long latency periods associated with these conditions.

9. Respondent's injuries occurred at DOE's K-25 and Y-12 sites in Oak Ridge, Tennessee. Respondent's employment at the K-25 Site commenced on September 26, 1976 as a Security Policeman. Respondent was physically located at the K-25 Site until November 17, 1993 when he was transferred to the Y-12 Nuclear Weapons site which is another LMES managed site and it too is heavily contaminated similar to K-25. Then in October 1, 1994, Respondent was transferred back to the Central

Training Facility a property of the K-25 site. Also at the CTF Respondent was exposed to the pollution from the SEG Incinerator, which also burns radioactive and other hazardous waste, releasing toxins and furans. Also the IT Corporation (Known to be a contaminated facility), these industrial facilities are located about 1/8 to 1/4 mile upwind from Respondents Central Training Facility a K-25 work site.

10. During his years at the polluted, contaminated K-25 site, he occupied office space at Buildings K-1020, K-1008 (old filter test facility), K-1652, K-303-8 (K-25 Building), Y-12 Security Police Headquarters, temporary Trailer and a Trailer at the CTF K-1654 located in the center of track. During his periods of employment at K-25 site Respondent while in performance of his duties was frequently in the 75 major buildings and infrequently in the lesser buildings and burial grounds.

11. Such work responsibilities often required him to work throughout the site; however, he often conducted job surveillance for other personnel to perform work at these facilities to report any known hazards such as radiation and radiological contaminants and report to management. DOE and its contractor LMES Union Carbide did not make these hazards known for many years.

12. K-1420, recently listed as one of the top ten most dangerous DOE facilities in the nation, served as a facility for decontamination of equipment, processing of waste, and electroplating. K-1420 confined at the time were highly contaminated throughout with contamination often loose and un-contained. Its immediate premises were host to several hundred drums of waste and was used to store this waste as well as to package and reprocess the waste. Radiological contamination was extensive even throughout the surrounding asphalt parking lot, the change areas, and even in the lunchroom. The metal plating facility once was located in the K-1420 Building was a source of cyanide and other chemical toxins. As a Security Police Officer and Supervisor, Respondent was not aware of the radiological condition of the facility, and had no training or knowledge about the chemical hazards present. DOE's negligent failure to enforce contracts, orders and standards led to this lack of information. Mr. Williams was to be transferred to the K-1420 Building after his first heart attack in 1989. This attempt shows a chilled management structure that is grossly incompetent.

13. Respondent was concerned about airborne transmission of hazardous chemicals and radioactivity to his body and believes to this day that air monitoring at the entire K-25 plant for such was severely inadequate. There was no continuous real time air monitoring, and he knew of no air monitoring for toxins. For several years in the early to late 80's the radiation monitors/alarms were disabled on the K-25 and K-27 buildings.

14. Work assignments at K-1037 were primarily in areas where atomic laser isotope separation (AVLIS) was taking place. This was an experimental process being developed for the enrichment of uranium to the isotope of U-235. Once again, Respondent is deeply concerned about the air that he breathed while working in these areas and realized that his knowledge of the past building application the classified Gaseous Diffusion Barrier Plant (still a classified process as are some of the metal and chemical association. Respondent now has reason to believe that the legacy contamination of the classified compounds may still be present and that the uranium was substantially altered, but he was not instructed or informed with knowledge of the process to know about chemical components or the inherent legacy contamination as well as the AVLIS contributions to the buildings contaminations.

15. Other job duties were at K-1435, the Toxic Substances Control Act Incinerator (TSCAI). He routinely conducted supervisory patrols and/or surveillance and monitoring of Security Police personnel. These surveillance included walking in the close vicinity of empty drums that had stored waste. He was not informed by labels or by instruction of the prior contents. In 1987/88 Respondent performing duties as the shift Security Police Supervisor responded to several accidents and spills at the Westinghouse incineration demonstration pilot plant in the Portal Eight parking lot. At no time was Respondent advised of the contamination or the health risk associated with this project.

16. On many occasions while working at the K-25 plant Respondent responded to process releases relative to process system failures. Respondent conducted both patrols and supervisory patrols of the major process buildings, laboratories, machine shops, metal plating facilities, etc.. Respondent was never properly informed as to the extent of associated hazards risks; was not provided with proper safety equipment.

17. Very often while working in the proximity of the waste tanks, he would be aware of suspicious looking cylinders (later to be identified as Manhattan Project era cylinders). Respondent asked Vicki Tharp (plant spokes-person on health and safety issues) on more than one occasions about the health hazards at the K-25 plant to which she replied we were safer at the plant than at home. The yellow and

sometimes green and grainy appearing substance was not only found on the Manhattan Project Cylinders but on various pipes, valves, all throughout the K-25 and K-27 buildings. He was not told or did not know then but realizes now that these compounds were in fact a product of the of the process and were thought to be enriched uranium ranging from a 5 to 90% depending where in the process one visited. Not only was this a carcinogen, heavy metal, and a radiation hazard. Lockheed Martin stated in 1992 that DOE and its contractor were practicing principles of ALARA (As Low As Reasonably Achievable) for chemical exposures, DOE and LOCKHEED failed to keep that promise with respect to the exposures suffered by Respondent and other K-25 workers. Respondent had frequent occasion for many years to patrol in very close proximity to UF6 storage cylinders in various parts of the plant including the Hydrogen Fluoride tank Farm and various waste containers.

18. DOE and its contractor negligently failed to impart any knowledge of the contents of these waste tanks and storage cylinders relative to hazards and volatility involved even though a routine part of his work was around them.

19. DOE and its contractor negligently failed to provide adequate training and information for Respondent regarding chemical hazards, risks, or protective measures, including his right to have his medical records maintained and available at the facility responsible for Respondent day to day medical care: also available if there was an emergency response to provide treatment to Respondent due to his several chronic illnesses. Respondent, was actually denied the good medical practice of having his medical records maintained at the plant providing care. For a period of months in 1995 and 1996 Respondent was informed by both the nurses and doctors that his medical files were missing or maybe misplaced. DOE and the contractor was negligent in there failure to respond to Respondent environmental, health and safety concerns, including imminent threats to human life such as he reported to LOCKHEED on several occasions. To provide and example Respondent was required participate in a fire training exercise at the fire training facility located in the main plant containment area on the north side of K-25. This facility burnt waste motor oil and transformer lube oil (contaminated with PCB's). The thick black smoke from this facility would be so thick at times it interfered with viability in a large area of the plant.

20. Limited chemical training covered Material Safety Data sheets (MSDS). K-25 plant pollutants continued to be concealed by frustrating employee efforts to get MSDS for the chemicals used in connection with the K-25 Insituform sewer line lining project.

21. On May 30, 1996, DOE's contractor and subcontractor violated a 1996 "stop work order" by K-25 plant manager Harold Conner on the sewer lining process because of concerns regarding diisocyanate. Mrs. Sherry Farver, a friend and co-worker /peer of Respondent raised concerns with DOE and LOCKHEED about the violation of the stop work order but never received a response from either DOE or LOCKHEED. LOCKHEED managers lied about the violation of the stop-work order. The Material Safety Data Sheet for the diisocyanate compound showed that the compound had a Threshold Limit Value (TLV) of 5 parts per billion, a highly toxic chemical, and that it was not to be used around hot water, to prevent "vigorous" and "violent" reactions. DOE's subcontractor used this diisocyanate compound in exactly this manner—in conjunction with hot water for curing—unreasonably risking Respondent's life and the lives of other employees due to DOE's failure to enforce OSHA, EPA and other standards that are mandatory. "Let's don't put anything in writing," Harold Conner, the LOCKHEED K-25 plant manager told a group of workers on May 22, 1996 in a meeting about the stop-work order. DOE's negligent management allowed this to happen.

22. On occasion, Respondent was required to respond to TSCA during the trail burns and original start up process where an accident or release had occurred and/or a failure of the TSCA waste processing systems. He was never told by DOE or its contractor of a mechanism called the Thermal Release Vent—which opens and directly vents TSCA emissions to the atmosphere when the system malfunctions. He now wonders what combination of contaminants that he breathed as a result of this and subsequent releases.

23. TSCA has had thirteen known accidental releases for durations of two or more hours each and at least two very serious accident/incident at the incinerator pilot project located in the Portal Eight parking lot. DOE negligently failed to protect workers from the synergistic effects of hazardous waste incineration as well as the increased hazards associated with products of incomplete combustion from hazardous waste incineration such as cyanide, dioxin, and furans. Hazardous materials and waste were mislabeled and disposed in violation of EPA—TDEC 24. The later incidental K-25 Site toxic exposures did not consist of field worked. Respondent worked as an instructor, and training officer.

25. When he first realized that he was being poisoned, Respondent assumed the exposures were from his past assignments in the field. As he learned of more workers who experienced the same poisoning, he realizes that many of these workers had never worked in waste processing areas of the site. Some of the workers were cafeteria workers and solely administrative office workers. Respondent and the others lived in different surrounding counties and performed a number of diversified jobs at the site, but it was quite apparent their one common link was the Oak Ridge K-25 or the Y-12 Site.

26. On September 27, 1976, Respondent began his career employment at Oak Ridge K-25 Site.

27. In 1989, preceding and specifically following his first heart attack his depression and fatigue became extreme. In 1993, Respondent began treatment with antidepressants.

28. During 1989-1995, Respondent's physical and mental health declined. Fatigue and malaise were relentless and increasing. Angina pain became a frequent occurrence. Incontinence (both of the bowel and urinary tract) accidents occurred frequently. Other symptoms developed, including severe short-term memory loss, tingling and numbness of his extremities, muscle twitches and sleep apnea, heat intolerance, sweating, muscle/joint pain, eye and nose irritation develop and constant moderate level ringing in my ears, dizziness, extremity conduction and control, and a significant loss of old factory senses.

29. On March 8, 1996, Respondent was examined by his PCP (general practitioner) and asked for a urine thiocyanate test.

30. On March 8, 1996, Respondent learned that the urine thiocyanate test was 29 micrograms/milliliter with normal range for a non-smoker being only 1-4 micrograms/milliliter.

31. On or about March 16, 1996, Respondent met with his manager Michael Knazovich to discuss his concerns and to request an investigation of his work area as two employees who were tested had high thiocyanate levels. LOCKHEED refused Respondent's request to take biological samples from other workers in the CTF and specifically his peers in his trailer. The CTF is located approximately 1/4 mile down wind of the SEG incinerator. On the stated basis that Lockheed believed there was no concern to workers.

32. On or before April 26, 1981 To March 1983, Respondent was exposed to what now and then is characterized as an unsafe laser, that Respondent believes has damaged his eyes contributing to his poor vision.

33. Respondent did phone/file a medical incident report on April 25, 1996: on this date Respondent was sick at home. Acting upon instructions from Dr. Edelman of the Vanderbilt Medical Center, he stated that Respondent should file with Workman's Comp (Willis Caroon). To meet the requirements for filing Workman's Comp. Respondent had to file a medical incident report. Upon information and belief, other workers were deprived of the ability to file medical incident reports in the time period since K-25 was closed. This negligently deprived DOE of operations information that would have allowed it to devote sufficient resources to environmental, safety and health information at the K-25 plant.

34. Respondent was under his PCP's on going care on March 28, 1996, with Visits at least every six weeks if not more often. Respondent PCP stated that he didn't know how to treat the various toxic issues. Respondent had raised concerns about. This lead to my visits to Dr. Kilburn, USC and a request to see Dr. James Bond a Neuro-opthamologist that my Insurance would not approve.

35. During January 1996, ill workers petitioned NIOSH for a health hazard evaluation of the K-25 site.

36. On March 28, 1996, Respondent was told by his PCP that his health required he be placed on short term disability. Respondent had to remove himself from the unhealthy work environment that exist at K-25 and Y-12 plants and for that matter the other ORO plant sites.

37. On February 8, 1996, NIOSH personnel arrived in Oak Ridge.

38. On or about February 9, 1996, Respondent was not scheduled by Lockheed Martin (as requested) to meet with NIOSH Nurse Karen Worthington. Respondent had to locate Worthington via Internet and talk to her by phone; Worthington requested medical records and signed release forms Respondent complied. There has been no further contact with NIOSH.

39. On April 4, 1996, Respondent was seen by Dr. Phillip Edelman by directive of his PCP. Edelman report was inconclusive by design. Williams not knowing that Edelman was the contract DOC for LMES was subjected to the influence of LMES management involvement in his personal medical care.

40. Respondent worked very competently and diligently, earning several favorable written recommendations and the respect of managers and co-workers alike. DOE

owed him a duty of care to protect him from harm from ultra-hazardous operations, including “legacy contamination” from such operations, which contamination was known to DOE.

41. This is a case of *res ipsa locutor* negligence, by keeping Respondent in a harmful work environment first at K-25 for a decade or more and then at Y-12 for 11 months and some days and then Back to K-25 for another year or more. Never once providing a safe work place; after he was found to have poisons in his body.

46. Respondent’s Primary Care Physician Dr. Joel Perkerson wrote in his 1997 patient notes that Respondent medical problems could be attributed to possible environmental exposures.

47. DOE’s negligence has again resulted in a worker’s unusual illnesses and chemical sensitivities, due to DOE’s indifference to the value of human life of Oak Ridge contractor employees. This can be confirmed by the March 1998 meeting at Pollard Auditorium with a team of doctors and contract Health Physics Technician. Where what appears to be at least several standard deviations above normal of beryllium in the topsoil in and around the K-25 site. Respondent also learned that the K-25 Powerhouse area was also contaminated with Beryllium legacy waste. As a security police training officer Williams participated in several tactical weapons exercises in and around the area and buildings. This powerhouse area was known to be highly contaminated by the DOE and its prime contractor Union Carbide/Lockheed Martin Energy Systems.

48. Respondent seeks not only compensation, but thorough reforms to halt Oak Ridge Operations’ negligent conduct of its environmental, health, safety and nuclear criticality functions, in violation of federal law, DOE Orders and contractual responsibilities.

49. DOE negligently failed to enforce its own safety and whistle blower protection rules and contractual provisions, resulting in personal injury to Respondent due to the presence of dangerous chemicals and radiation. DOE’s negligence abused the trust of K-25 workers, to whom DOE owed a duty of care, protection and loyalty.

50. The radiation in K-25 was negligently termed by DOE as “historical” or “legacy” radiation (due to the time when it was deposited), as if that obviated the requirement to decontaminate and decommission a uranium enrichment plant with thousands of missing pipe segments, some removed due to criticality or near-criticality.

51. DOE now admits that K-25 presented significant life, safety and health risks to workers. The radiation and chemical exposure was ongoing for K-25 workers. DOE negligently failed to ever inform any workers that K-25 was a Superfund Site, or that workers were being exposed to chemicals and radiation on a daily basis.

52. DOE’s negligently misleading “historical” or “legacy” radiation designation, DOE’s yellow radiation ropes and DOE’s vague assurances did not fulfill DOE’s legal and moral duty to clean up the radiation and toxins, with K-25 shut down in 1985. These acts and facts have been documented in the Nashville Tennessean in 1997.

53. DOE’s duty to follow its own safety, health, environmental and radiological standards at K-25 after the end of the Cold War is not a “discretionary duty” under the Federal Tort Claims Act (FTCA). DOE’s breach of its duty is the proximate cause of Respondent’s damages. DOE put K-25 workers in harm’s way with a risk of nuclear criticality and chemical releases ever-present, radiation alarms not working, and strange smells, asbestos, cyanide, and other hazards permeating the buildings. The confinement of human beings in this K-25 site was tantamount to a warped, negligent “experiment” with some 3500 peoples’ lives, without moral or legal justification or excuse, in violation of the Geneva Convention and the Nuremberg Principles.

54. When Respondent was moved in may of 1992 to K-303-8 (now closed and barricaded) DOE had been negligent in failing to perform its duties to protect worker and public health from the incompetence of DOE’s contractor, Lockheed Martin, which had previously placed other workers in harms’ way in unsuitable office space in unsafe locations, a fact that was known to DOE.

55. DOE/AEC signed in 1971 a memorandum of understanding (MOU) with the Department of Labor Occupational Safety and Health Administration, pledging to obey all OSHA standards. DOE Orders require that safety be protected. Such agreement and orders were negligently not complied with, to the detriment of Respondent and K-25 workers.

56. DOE failed to supervise its contractor properly in performing annual, weekly and other required, necessary and proper maintenance chores at the uranium enrichment plant and the nearby incinerators, as well as storage of radioactive and toxic materials on the K-25 site, some in leaking containers.

57. DOE failed to give directions required by DOE Orders to clean up the K-25 plant. No proper deactivation, decontamination or decommissioning of the K-25 site was not started until the 1999 several years after respondent went on disability, with uranium and other tonics left in the pipes of the plant, with thousands of missing segments of process pipes and visible uranium dust and other contaminants strewn about the K-25 plant.

58. Respondent now has a number of health conditions that are chronic and relate to chemical sensitivity (diagnosed with chemical encephalopathy), which health conditions were created by the unsafe conditions in DOE's dangerous workplace, the K-25 site. Those health conditions interfere with Respondent's ability to enjoy life with his family and a loss of consortium with his wife and lives as elderly person before his time.

59. After the Cold War ended, DOE's negligent placement of workers in such hazardous areas as the K-25 plant—and DOE's failure to see that training and safety information was given to workers in such hazardous areas—was beyond the pale of any "discretionary function." There was no justification or excuse as asserted in the Cold War for failing to inform workers about the risks of K-25, which was closed in 1985 and negligently not decontaminated or decommissioned during the ensuing twelve (14) years.

60. Respondent expressed to the management of DOE and Lockheed Martin Energy Systems his serious concerns regarding his being moved to the K-303-8 (a very hazardous plant area) to an office at the K-25 plant. LOCKHEED took approximately 18 months to move Respondent from K-303-8, furthering his chemical, radiological, and asbestos exposures. DOE's failure to enforce its contractual and DOE Order provisions regarding workplace safety put Respondent in harm's way and worsened his illnesses. DOE's failure to act on Respondent's employee concern kept him in harm's way.

61. For years, Respondent's concerns were largely ignored.

NEGLIGENT ACTS BY DEPARTMENT OF ENERGY

62. Respondent DOE demonstrated negligence and unfitness to protect worker safety, which failure exacerbated the health effects upon Respondent and other K-25 workers, needlessly exposed to a uranium enrichment plant that was negligently not decontaminated and decommissioned, sitting in dangerous condition twelve years after its abandonment, in close proximity to an improperly managed incinerator burning both radioactive and toxic wastes in a manner that assured a "blowback" of toxins onto the K-25 plant site. DOE negligently:

- a. Failed to perform or supervise or provide proper deactivation, decontamination and decommissioning;
- b. Failed to perform or supervise or provide proper oversight;
- c. Failed to perform or supervise or provide occurrence reporting;
- d. Failed to perform or supervise or provide maintenance;
- e. Failed to perform or supervise or provide proper biological monitoring of employees;
- f. Failed to perform or supervise or provide proper medical care for employees;
- g. Failed to perform or supervise proper workplace radiological, chemical or heavy metal monitoring;
- h. Failed to perform or supervise or provide medical services, negligently failing to adhere to the provisions of DOE Orders;
- i. Failed to perform or supervise or provide proper industrial hygiene or health physics protection;
- j. Failed to take care that DOE's contractual requirements and orders were executed by its contractor;
- k. Failed to investigate adequately in response to Respondent's safety complaints to DOE;
- l. Failed to provide a full and fair investigation and report in response to Respondent's employee concerns and other worker safety and health concerns;
- m. Chilled worker concerns about health threats with DOE's "scorched earth" and negligent policy of unjustly and indiscriminately fighting workers' concerns about workplace hazards, as demonstrated by former AEC Order 0521, as was documented by Clifford T. Honicker without rebuttal by DOE—in the *New York Times Magazine*. DOE managers and minions negligently continued to conceal information on DOE plant hazards even after the end of the Cold War in 1991. This policy of fighting the just claims of contractor workers with federal tax dollars involves a scheme or plan whereby DOE and LOCKHEED contract and combine to spend millions of tax payor dollars, in order to have a chilling effect on workers who reveal safety, health and environmental problems involving DOE and LOCKHEED negligence. This neg-

ligent policy insulates negligent managers from criticisms, negligently furthering the environment in which DOE's negligence persists.

n. Massively resisted any change that would end its negligence in an inherently dangerous facility, while in deep denial that any problems exist at the facility, to the extent that DOE Oak Ridge Operations Manager Jim Hall refused to meet with three reporters from the Nashville Tennessean newspaper regarding environmental, safety and health problems at the K-25, X-10 and Y-12 plants in Oak Ridge. As Leonard Schroeter writes:

Much like the tobacco industry, the nuclear industry, which was wholly indemnified by the United States government, has a policy of full-scale war against any person with the temerity to suggest that radiation might be bad for their health. Thus, despite the new O'Leary policy of disclosing what a half century of nuclear secrecy, questions still remained as to whether the United States government continued to be committed to no accountability, no responsibility, and no compensation for the powerless victims.*

o. Committed other negligent acts of commission and omission, acts presently concealed by negligent use of classification, including acts related to the use of heavy metals including but not limited to mercury, arsenic, copper, chromium, molybdenum, lithium, lead, tin, strontium, Nickel powder concoction and magnesium, etc. at the K-25 site.

p. Continues to subject Respondent and other workers, residents and citizens to negligence, including the "re-industrialization" taking place without proper protections for workers, with DOE employee concerns personnel telling LOCKHEED workers expressing concerns about K-25 to stop calling their offices, e.g., about new personnel working for new employers who have located at K-25 as part of "re-industrialization," without adequate training, information or radiation and chemical protection, including workers observed eating and smoking in radiological areas in contaminated buildings;

q. Continues to ignore concerns about retaliation, including the incredible, request by PCP to remove Respondent from an unhealthy work environment. Respondent raised concerns about his work place from October 1993 to April 28, 1994. Respondent was moved out of harms way until Colonel Willis Leon Clement (Retired) was presented with the April 28, letter from Respondent' PCP. Colonel Clements failed to Forward this letter to medical. Respondent had Dr. Zannoli put this letter into his medical file. Respondent was repeatedly retaliated for protected activity by LTC Lorry Ruth (Retired) a direct report to Colonel Clements. This harassment was detrimental to respondents cardio pulmonary health.

66. This hostile K-25 working environment was utterly intolerant toward worker concerns about K-25. DOE officials were "frozen in the ice of their own indifference." As a result of DOE's negligence in allowing it to persist, Respondent and numerous K-25 workers already in harm's way were kept in unhealthy work environments longer.

RELIEF REQUESTED

67. Respondent requests that health care be provided and DOE pay loss wages and compensatory damages.

68. Respondent further requests that DOE provide for lifetime medical monitoring and treatment by independent physicians of the his choosing, and for all employees so exposed.

69. Respondent requests that DOE agree to: B. Immediate and unconditional declassification, pursuant to the Freedom of Information Act, the Privacy Act, the community "right to know" laws, the publicly announced declassification orders of Secretary of Energy Hazel O'Leary, and the recommendations of the Report of the President's Commission on Protecting and Reducing Government Secrecy, of all documents on toxic hazards on the Oak Ridge reservation, including the use and abuse of chemicals and compounds, including but not limited to cyanide, mercury, arsenic, copper, chromium, molybdenum, lithium, lead, tin, strontium, magnesium and nickel. at K-25, other K-25 hazards and the nearly 100 still-classified compounds to which workers were exposed in Oak Ridge, and the contents of the Records Holding Task Group (RHTG) in Oak Ridge, Tennessee. Rather than forcing plaintiffs to seek this necessary and proper declassification ad hoc, piecemeal, one case at a time, and risk missing relevant information, Respondent hereby makes this urgent, generic request for all information on such hazards should be declassified at last. The Cold

*Leonard W. Schroeter, "Human Experimentation, The Hanford Nuclear Site and Judgment at Nuremberg," *Gonzaga Law Review* 147, 161.

War ended six years ago. Inasmuch as a Q-cleared attorney is ready to conduct the review, the declassification should not be delayed by one more day DOE should not be allowed to use the 911 incident and the Patriots Act as an excuse to hide proof of the dastardly deeds and hazards associated with legacy operations.

CONCLUSION

70. We are ready, willing and able to assist you and the committee good offices in its work. Please call upon us when we can help you understand what DOE ORO did to Respondent and other workers similarly situated.

71. DOE paid for and sponsored a contract team of doctors to evaluate the first 53 employees claiming illnesses connected to the work place. This evaluation was supposed to last 6 months has taken 6 years (1997 to 2003) resulting in many of these employees diagnosed with work place related illnesses. This DOE sponsored evaluation is proof enough to support workers complaints of exposures and health concerns.

72. We (CHE) were the primary group that brought forth the very idea of what came to be known as the OCCUPY and we have been very active in trying to reform EEOCIPA to where it treats all disabling illnesses attributed to the DOE/Contractor work place equally, doing away with sub part D and move its exposure and illnesses to Sub Part B of the EEOCIPA.

Anchorage, AK, November 10, 2003.

Hon. LISA MURKOWSKI,
U.S. Senator for Alaska, Hart Building, Washington, DC.

Re: EEOICP Hearing—11/14/03

DEAR SENATOR MURKOWSKI: I respectfully request my statement and attachments are entered into the above Hearing Record.

STATEMENT OF BEVERLY ALECK, WIDOW, NICK ALECK (DECEASED) AMCHITKA,
ALASKA, CANNIKIN-MINER

BACKGROUND

1. My husband, Nick Aleck, was one of the miners of the 6,000-foot underground cavity on the Cannikin atomic test from 1970 to 1972 at Amchitka, AK. We were both ignorant about radiation exposure. He died five years later from leukemia (CML) of the blast crisis, on Christmas Day 1975.

2. With numerous medical expenses and Nick Aleck's death, union attorney's suspected radiation connected with the Atomic Tests caused Nick's leukemia. On April 1976, we filed State Worker's Comp and Federal District Court claims, and were refused documents requested; they were labeled as 'classified' or 'secret', wherein my claim's were dismissed in 1980-82 without prejudice.

3. Following passage of the 1988 Atomic Veterans Act, and the 1990 RECA act by Congress, Energy Secretary Hazel O'Leary on December 7, 1993 announced the beginning of the end of the Department of Energy's policies of secrecy and repression concerning the United States' nuclear weapons testing program, wherein I immediately renewed my efforts to obtain information concerning the radiation exposures that led to Nick's death. I obtained an important report, a copy of the "Amchitka Island Long Term Hydrological Monitoring Program" (marked For Internal Use Only), on February 25, 1994, through the Alaska Department of Environmental Conservation (ADEC).

4. On October 31, 1996, Alaska's Governor Knowles ordered an investigation of the effect of the Atomic tests on its workers, the environment and the Aleute residents in the Aleutian chain, and demanded test site records. An oversight advisory committee was formed—ATAG. I was designated by the Alaska State District Council of Laborers to represent Alaska's Amchitka test site workers.

5. DOE radionuclide documents and work records made available by 1997-1998, were used by Dr. Rosalie Bertell, to prepare "Estimating the Exposure to Ionizing Radiation Incurred by the Workers at the Amchitka, Alaska Test Site". Thereafter, DOE and the State of Alaska ADEC entered into an agreement (AIP) to fund the 1999 Amchitka Workforce Medical Surveillance Program.

6. In 1999, the Alaska State Legislature passed a unanimous resolution, SJR-21, demanding the United States Department of Energy resolve all Alaskan's claims relating to Amchitka's Atomic Tests, and requested our congressional delegation to

take appropriate action. In 2000, U.S. Senator Frank Murkowski obtained a SEC for Amchitka workers in passage of the EEOICP Act by Congress.

7. The Medical Surveillance Program began in 1999. In July 2001, the Alaska Resource Center was opened, which has been effective in assisting claimants establish their work histories, and file for DOL and RECA lump sum payments, and file DOE-OWA and State WC Claims (now deadlocked). I personally helped many claimants file DOL and DOE-OWA State WC claims under the Act, including FECA claims by government contractor employees. See Newspaper clipping attached.*

8. Thereafter, I was assigned to special research work by Dr. Knut Ringen. Backed with a large accumulative background of research of DOE and other documents, including locating an additional 371 boxes of records; Contacts with hundreds of former Amchitka workers; Personal knowledge of the early years workers, their survivors; and the Early years Contractors, and Subcontractors. I have just recently retired from my work with the Alaska State District Council of Laborers.

SUMMARY—DOE-OWA—PROCEDURE: STATE WORKERS' COMPENSATION CLAIM

Recently, I experienced my own survivor's DOE Subtitle D "test" procedure as follows:

Oct. 31, 2002. Request for Review by Physician Panel was filed. Extensive work history of the Cannikin shaft/cavity including 38 photos of underground activity was provided to the panel.

April 8, 2003. A Physician Panel Positive Determination was issued.

April 28, 2003. Fax: To Bechtel, "First Report of Injury"; Physician Panel Positive Determination; DOE Transmittal—Accepted Panel Determination—Instructed Bechtel (accept Primary Liability).

May 5, 2003. Fax: Bechtel—Requested Medical Records, Death Certificate and Marriage Certificate.

May 27, 2003. "First Report of Injury" filled out by employer "Bechtel" (Holmes & Narver's successor), validated by Darryl Campbell, WC specialist, and filed with Alaska Workers' Compensation Div.

June 20, 2003. WC Div faxed Questions: Employer/Bechtel (Holmes & Narver); verify Ins./Address.

July 8, 2003. Darryl Campbell, Bechtel-Nevada, confirmed Bechtel's Alaska Div. WC filing, and Holmes & Narver Ins. Phone and E-mails outlined the process. "He would not be the adjuster. The Ins. Co. sets up the claim and pays all appropriate benefits. His main responsibility is administrative. Receives notices from DOE, sends paperwork/notify the insurance Co's, and reimburses the carriers".

July 10, 2003. Notice: AK State AWCD Claim number issued, Holmes & Narver—Insurer/Adjuster.

July 11-18, 2003. E-Mails Bechtel: "Notice of Injury" was sent to wrong insurer, will resend to Hartford Ins. This is a "trial by fire" to confirm who the insurer is and contact to insure they know of the DOE program. This is the first case from prior contractors of Bechtel, and is our "test" case to learn as we go along. Talked with Roberta Highstone at "Harbor Adjustment Services". They are in process of setting up the claim, you should be hearing from the Adjuster.

STATE WC—INSURERS—LEGAL ACTIONS:—(also served Bechtel)

July 18, 2003. Legal Appearance—Robert L. Griffin: Petition to join claim with Carlsson case.

July 21, 2003. Objection to Petition, and (4) Questions, filed by Beverly Aleck, claimant.

Aug. 18, 2003. R.L. Griffin: Filed a Petition to "Withdraw Petition" to join Carlsson case.

Although Bechtel-Nevada (DOE' current Contractor) made an effort to carry forth DOE-OWA's intent to reimburse this Alaska WC claim, under the current limitations of Subtitle "D" of the Act, the claim is now deadlocked, unable to move forward due to vicious legal action by the insurers attorneys, who are not being informed of potential reimbursement because there is "NO Willing Payer" language provision in the Act, to permit reimbursement to insurers, or direct payment of DOE physician panel approved claims, enabled by the signed MOU between the State of Alaska and Department of Energy. See: Alaska State/DOE MOU attached.

Subtitle—D Claimants Are Now Deadlocked

I am deeply concerned that Subtitle D Claimants are now deadlocked from moving forward with their Alaska State WC claims. Former AEC (DOE) Amchitka contractors and numerous prior insurers are no longer in business. In order for DOE-OWA

*All attachments has been retained in committee files.

WC claims to move forward, and enable the Primary Liable Contractor "Role" attempted by DOE Bechtel-Nevada (or any other DOE Primary Liable Contractor/Successor or Current Agency), a Third-Party Willing Payer amendment to the EEOICPA 2000 Act Subtitle D, should be implemented by Congress immediately. See: Suggested Amendment—Subtitle D, Sec. 3661.

There are only a few claims (approximately 49) that have a DOE-OWA positive physician panel determination. To only appropriate funds to government agencies to process these claims @ \$20,000 or more per claim, while ignoring this small number of claimants entitled to compensation, is inexcusable. It is important these claims can be compensated promptly, timely, because the statutes of limitations are running under current State WC law, while claimants are dying. Under Alaska State Workers Compensation law, survivors have to file for Death Benefits within one year, from the date of the DOE-OWA Physicians Panel positive determination.

By contrast, injured Amchitka workers who were AEC (DOE) Government Contractor employees are able to file WC claims under FECA, and be compensated without any delay. It is unconscionable of Congress to ignore the blue color construction workers who sacrificed their health and lives for all American's to be secure today, while 30 years (or more) later their claims are deadlocked in this existing process. Congress cannot sanction Federal employees FECA compensation over civilian workers, creating two classes of U.S. citizens at the same DOE work site. Alternatively, civilian workers could be compensated as a designated FECA employee, by Congress.

By further contrast, the victims of 9-11 have not had to wait 30 years for just compensation. Mr. Fineberg's chart sets \$250,000 the minimum for pain and suffering, plus lost income estimated @ \$175,000-\$4,000,000 per claimant—authorized by Congress to pay directly from the U.S. Treasury. There are nearly 3,000 9-11 claimants, and only 49 DOE claimants with physician panel approvals. Congress has a moral responsibility to immediately pay these approved claims, under a law that was passed three years ago.

Amchitka claimants, and all DOE Test Site claimants will greatly appreciate your effort to amend Subtitle D, enabling prompt, just compensation for all claimants, and bring belated final closure to this personal tragedy.

Maryville, TN.

Senator LAMAR ALEXANDER,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR ALEXANDER: In 1978, I began my employment as an administrative assistant at the K-25 Oak Ridge Gaseous Diffusion Plant in Oak Ridge, Tennessee. When I began working at the K-25 Plant site I was 25 years of age and in excellent health. It was not long after I started working at this DOE nuclear site that my overall health began to decline and I began experiencing a number of serious health issues. For the past twenty years of my life I have gone from physician to physician, had numerous surgeries to remove glands, cysts, fibroid tumors, and most recently a large tumor and approximately one-fifth of my liver removed. I was in surgery a total of three and a half hours and shortly after the surgery was informed that my right lung had collapsed and that I had pneumonia in both of my lungs. On the second day after my surgery I told my husband that I did not believe that I was going to survive from this and ever be able to leave Duke Hospital. It is with many prayers from friends, co-workers, and my family that I managed to make it through this most painful and difficult time.

A week ago, I received a diagnosis upgrading my Beryllium Sensitivity to Chronic Beryllium Disease. Once I began working at the K-25 Plant I started having asthma type symptoms along with chronic pneumonia and pleurisy which was later diagnosed by a K-25 medical screening process as being Beryllium Sensitivity. Chronic beryllium disease, or CBD, is an inflammation in the lungs that can occur when a person is exposed to respirable beryllium fumes, dusts or powder, and subsequently demonstrates an allergic reaction to beryllium. CBD is an occupational disease that may occur in the manufacture of metallic beryllium, beryllium oxide ceramic, or alloys containing beryllium. This disease can lead to clinical symptoms that include scarring and damage of lung tissue, causing shortness of breath, wheezing and/or coughing. Extreme cases of CBD can cause disability or death.

For years I have been searching for answers to the many illnesses I have been diagnosed with and found somewhat of a relief in July 1999, when the Clinton/Gore administration made a historic announcement and apology to all of the nuclear workers and their families across the country that we had been put in harms way and that there were times when DOE had consistently placed production objectives

ahead of worker health or safety. On Dec. 7, 2000, the President signed the Energy Employees Occupational Illness Compensation Act (EEOICPA) of 2000, which has since been administered by the DOL along with the DOE. Within this program, it was the initial desire of congress to assist workers with their worker's compensation claims for occupation diseases relating to working in a DOE nuclear facility.

However, instead of following the congressional intent of creating a uniform system, DOE implemented regulations placing numerous obstacles contained in state worker's compensation programs that congress had sought to circumvent through a federal assistance program. This was not surprising to some as indicated in the National Economic Council report of 2000, which documented that state worker's compensation systems were particularly ill-suited to provide workers compensation for occupational disease due to statutes of limitations, varying and difficult burdens of proof with respect to causation, and proving which employer was responsible for each illness when there were many contractors who worked at these DOE nuclear sites.

Congress' intent was to assure a non-adversarial process be set forth within DOE to assure that these sick workers who suffered from illness or disease from exposures at their workplace to toxic substances would be paid by the DOE contractors without a legal battle. It was clearly stated, the government had taken the responsibility for the harm suffered by these workers and their families and that they should not have to wait years to receive assistance through DOE and state worker's compensation programs. It was also clearly understood that some of these workers may not survive long enough to receive aid through the DOE program and that there was an urgent need to implement this program and to help these workers and their families.

In October 2003, the General Accounting Office, the investigative arm of Congress, had been asked to look into the bottlenecks of the DOL and DOE's system set up to handle compensation claims filed by sick nuclear workers from the Cold War era, or their survivors. An estimated 650,000 to 750,000 people worked in our nation's nuclear defense program and thousands of them have sustained disabling or fatal illnesses and diseases as a result of their exposure to some of the most harmful substances known to mankind.

The preliminary GAO report showed that of the nearly 19,000 cases filed with the Department of Energy (DOE), only six percent had been completely processed (42 with physician panel determinations and 1,170 found ineligible or withdrawn at request of claimant). More than fifty percent (10,109 claims) had not begun processing. Nearly two-thirds of pending cases were filed within the first year of the program, which is an average of 571 cases being filed on a monthly basis since July 2002.

My question to Congress is, were the claims which were denied by the Department of Energy, denied for any of the above reasons as indicated in the National Economic Council Report of 2000, in their recommendations as to why the state workers compensation program would not work for these nuclear workers. If the initial intent of Congress was to compensate these workers and their families for their pain and suffering, why are these claims not being processed in a timely manner as indicated in the GAO report and why are so many of them being denied if this process, is in fact, going to work?

On July 31, 2001, the Energy Employees Compensation Claims Center opened in Oak Ridge, Tennessee, and on August 8, 2001, I filed my claim with the DOL for my beryllium sensitivity and with the DOE for my heavy metal toxicity and relating illnesses/diseases. The DOL approved my claim for my beryllium sensitivity a little over a year ago; however, it has been over two years since I have heard anything from the Department of Energy regarding my personal claim.

I was placed in an extremely difficult financial situation due to my health issues and was forced to file for bankruptcy in 2001. In 1999, my out-of-pocket medical expenses were in excess of \$7,000 with an annual income of less than \$30,000 which put a tremendous burden on myself and my daughter who at that time was a high school student. I was unable to obtain any health or life insurance due to my pre-existing conditions and was unable to work due to being placed on permanent medical disability. I was mentally and financially devastated and still had heard nothing from DOE regarding my claim for illnesses. My only prayers were that I would be able to keep a roof over our heads until my child graduated from high school.

Approximately two months ago I received a call from the DOE, Office of Worker Advocacy regarding the claim that I had filed on August 8, 2001. They advised me that they were going to begin working on my state workers compensation claim and that I would be hearing from a nurse who would be handling this. This week, two months after I had received my initial call from the claims office, I received a call from my claims advisor and was then informed that I would be receiving a call from

the Oak Ridge claim office to go and meet with someone there to go over my medical history.

I received that call yesterday, and have an appointment set up for the first week of December. Other than the above mentioned calls that I have received, I have never gotten any written correspondence in acknowledgement of my initial filing of my claim with the Department of Energy and still have not received my claim number. To my knowledge, over 3,700 claims have been filed from the DOE Oak Ridge facilities and to date only 7 of those claims have been processed through the Physician's Panel. These figures are unacceptable and DOE should not be permitted to further delay the handling of any of these claims.

The following is a list of my illnesses/diseases since I have worked at the K-25 Gaseous Diffusion Plant which may help others to see how complex these health issues are for the nuclear workers who are suffering and still have not received any compensation:

- Reoccurring pneumonia and pleurisy with asthma which was later diagnosed as beryllium sensitivity and recently upgraded to Chronic Beryllium Disease;
- Degenerative bone and joint disease, acute muscle/joint pain and swelling;
- Crippling fluid buildup on knees, heels, and toes;
- Osteoarthritis;
- Fibromyalgia;
- Diseased sublingual/submaxillary glands in left side of neck which were surgically removed;
- Heart disease, including arrhythmia;
- Chronic fevers and swelling of lymph nodes with flu like symptoms;
- Chronic cystitis and nephritis;
- Right ovarian cysts and removal of right ovary;
- Multiple hemangiomas in liver . . . On June 4, 2003 had giant hemangiomas and one-fifth of liver removed . . . diagnosed with NAFLD (Nonalcoholic fatty liver disease);
- Severe tremors, speech difficulty;
- Eating disorder;
- Sleep disorder;
- Night sweats;
- Restless Leg Syndrome;
- Depression;
- Anxiety and panic attack syndrome;
- Gallbladder removed;
- Fibroid tumor in left breast was biopsies for cancer;
- Abdominal hysterectomy due to chronic endometritis and multiple fibroid tumors;
- Pancreatitis;
- Hyperlipidemia;
- Type II diabetes;
- Metabolic syndrome;
- Thyroid disease with multiple nodules in neck;
- Neuropathy;
- Severe memory loss;
- Cluster migraines;
- Auto-immune disorder;
- Chronic Epstein-Barre virus;
- Chronic Fatigue Immune Deficiency Syndrome;
- Hyadal hernia with GERD;
- Tested positive on bladder cancer tumor antigen test;
- Tested positive on one blood hemicult test for colon cancer;
- Daily flushing of ears, face, and neck;
- Intestinal problems.

My days are still filled with doctor appointments, medical testing, and physical therapy and I, like thousands of other nuclear workers have become totally discouraged with the way DOE has handled their responsibilities. There has been a total disregard for these sick cold-war veterans who gave so much for their country and have received nothing but mere excuses from the Department of Energy as to why they have not been helped yet, why their claim has been denied, or why DOE needs more funding and more time to handle these claims. The Department of Energy has had the money and the time to implement and make this program work and yet continues to disregard the rights of citizens in this nation and their rights as cold-war veterans whose lives have been changed forever.

I wish to thank you for taking the time to read my testimony. My continuing prayers are that this administration will see that DOE is held accountable for their failures to make this program work as was intended, and that these families will be given the immediate attention and help they so badly need and deserve. Time is not on our side. We appreciate any and all help you can give us.

Sincerely,

JANINE L. ANDERSON.

STATEMENT OF SYLVIA M. CARLSSON, WIDOW/SURVIVOR, ANCHORAGE, AK

I was one of the first Alaskans to receive a positive Subtitle D Physicians Panel Determination from the U.S. Department of Energy, Office of Worker Advocacy (DOE). I am a widow/survivor. My husband was a shaft miner on Project Cannikin at Amchitka Island from 1970 through 1971. He was exposed to ionizing radiation in the course of his employment with Kiewit-Centennial, a prime contractor of the Atomic Energy Commission, now DOE. He was 32 years old at time of exposure. He died before his 41st birthday in 1979 of colon cancer.

I filed a claim for workers compensation under the Alaska Workers Compensation System as suggested in the April 16, 2003, Determination letter from Beverly Cook, DOE Assistant Secretary. I was assured that the contractor would be notified and asked to accept primary liability for my claim and would also be asked not to raise any affirmative defenses in my case. The exact opposite of DOE's letter and determination occurred. My workers compensation claim is being aggressively opposed by two different attorneys representing two different insurance carriers, the contractor and adjusters. I requested information from DOE Secretary Abraham about DOE's not contacting the contractor. I did not receive an answer to my inquiry. I was informed six months after my inquiry via e-mail from Tom Rollow, Director, Office of Worker Advocacy, that his office would not be able to give further assistance. He did not mention the Willing Payer issue at all.

Governor Frank Murkowski requested that DOE Secretary Abraham find an immediate solution to the problem of the lack of a Willing Payer. Governor Murkowski's May 2003 letter has yet to be answered. Since then, Alaska's Senator Lisa Murkowski and Congressman Don Young have written individual letters requesting that DOE address the Willing Payer issue. Alaska's Commissioner of Labor, Glenn O'Leary; Alaska's Senator, Con Bunde, Chairman of Labor and Workforce Committee, also wrote letters requesting that the Willing Payer issue be addressed in order to assist Amchitka workers in their claims before the Alaska Workers Compensation Board. None of those inquiries have been answered to my knowledge.

In the meantime, I have spent countless hours in depositions, pre-hearing conferences, hearings, and meetings in defense of my workers compensation claim. I have also had to meet demands from opposing attorneys for volumes of documents which has imposed a financial burden on me.

The affirmative defenses raised by opposing attorneys include: 1) is Kiewit-Centennial (the contractor) entitled to an offset to any amounts recovered by me (the claimant) under the EEOICPA; and 2) Does the release I signed under Subtitle B in the federal arena bar recovery under state workers' compensation. If the Alaska Workers Compensation Board rules in my favor, I have been assured that the opposing attorneys fully intend to appeal the decisions to Alaska's Supreme Court, thus tying up my claim for at least two to four years.

The merits of my case will be heard sometime in 2004 when opposing attorneys give up their game of petitioning the AWCB for continuances. So far, they have been successful in two continuances so I am uncertain whether or not my claim will be heard anytime soon.

Opposing attorneys in my case have retained medical experts to counter DOE's Subtitle D Physician Panel Determination. Fred A. Mettler, Jr., MD, MPH, Professor Emeritus from the University of New Mexico School of Medicine and John R. Frazier, PhD, CHP with Auxier and Associates will be testifying against my claim. I am told, incidentally, that Dr. Frazier is a senior analyst with Auxier and Associates, which has a contract with NIOSH to do site profiles under the EEOICPA. I have made inquiries of NIOSH about this very obvious conflict of interest but have had no response.

Since January 2003, nine former Amchitka workers have died, all of cancer and none, to my knowledge, having received benefits under Subtitle D of the EEOICPA. The tragedy is that many more will follow. I am aware of at least 150 claimants who are awaiting responses from DOE. Opposing attorneys are not even waiting for those claimants to receive a Physician's Panel Determination. A number of Amchitka claimants have been receiving demands for medical records, for social secu-

ality records, for other information and many of those claimants are very ill and unable to respond.

Over 90 days ago, seven Amchitka claimants were told by DOE that they would be receiving their Physician Panel Determinations within a few days. Since then, DOE has told each a different story, i.e., the physician doing the determination is ill; the physician reviewing your case died; the person handling your case went on vacation and we can't find your records. I would like to reiterate that nearly all the Amchitka claimants are ill with cancer, many unable to even make inquiries about the status of their claims and all are becoming completely stressed by the tactics used by the opposing attorneys.

Had DOE been honest and forthcoming in its communications with claimants, we would not be having the problems we are having now. In October 2002, Beverly Cook came to Anchorage and met with over 150 claimants. She was explicit in her statement that she would have no problem in "reaching out and touching contractors" in order to ensure payment of the Subtitle D applications once a positive physician's panel determination had been rendered. In addition to making this announcement, she met with individual claimants and made the same promise. She did not retract that public announcement and has not responded to any inquiry regarding the Willing Payer issue. In my opinion, she harmed claimants by making such statements. Many believed her and now those claimants are having to fight opposing attorneys, some without the benefit of counsel.

In direct contrast to DOE's lack of performance under the EEOICPA, the Department of Labor has managed its obligations under Subtitle B with professionalism, sensitivity and rapid response. For example, the Department of Labor became aware that Amchitka workers were experiencing problems with the medical cards it had issued to some of the claimants. DOL sent two of its staffers to Anchorage to resolve the problems.

In addition, when the DOL Director was informed that opposing attorneys in my case were raising affirmative defenses that involved Subtitle B payments, he offered to send his legal counsel to Anchorage for the hearing. The law is quite clear that Subtitle B payments are not considered offsets; however, opposing attorneys in my case are pressing the issue. DOL representatives have not only been responsive to claimants, but unlike DOE representatives, they have been honest and willing to assist wherever they can. Had DOL been given the responsibility for implementing the EEOICPA including processing of claims and resolving the Willing Payer issue, we would not be talking about the problems right now.

It is ironic that many are being compensated by the EEOICPA including the Science and Engineering Associates (SEA); the C2 Lobbying group; the staff of the Office of Worker Advocacy at DOE; medical consultants Fred Mettler and John Frazier; at least nine attorneys in Alaska and possibly 10 times that many across the nation; and many others. But those for whom the legislation was written are not being compensated because of the poor performance by DOE.

I am requesting that this committee undo the harm that is being done to EEOICPA Subtitle D claimants, not only to those in Alaska but elsewhere by taking action to either demand that DOE fulfill its obligations without delay under the EEOICPA or relinquish the program to another agency that can do the job.